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IN THE

Supreme Court of the United States

HANNA PERKINS SCHOOL, *et al.*,

Petitioners,

v.

DORRIS SIMMONS-HARRIS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ohio Pilot Scholarship and Tutorial Program, which provides scholarship and tutorial funds to a broad class of public and non-public school, low income families comports with the Establishment Clause of the First Amendment when the recipients are defined without reference to religion and where the identity of the public, secular or religious school of attendance is the result of the independent and free choice of various individuals participating in the Program.

PARTIES TO THE PROCEEDINGS AND STATEMENT PURSUANT TO RULE 29.6

Petitioners:

1. Hanna Perkins School, Ivy Chambers, Carol Lambert, Our Lady of Peace School, Westpark Lutheran School Association, Inc., Lutheran Memorial Association of Cleveland and Delores Jones were intervening Defendants-Appellants in the courts below and are Petitioners herein. None of the school entities listed above has a parent company or publicly held company owning 10% or more of its stock.

Respondents:

1. Doris Simmons-Harris, Marla Franklin, and Steven Behr were Plaintiffs-Appellees in the courts below.

2. Sue Gatton, Mary Murphy, Michael Debose, Cheryl Debose, Glen Altschuld, and Deidra Pearson were Plaintiffs-Appellees in the courts below.

3. Dr. Susan Tave Zelman; the State of Ohio through its General Assembly, Governor and other agents; and Sandra Berry were Defendants-Appellants in the courts below and are filing a separate petition for a writ of certiorari.

4. Senel Taylor, Johnnietta McGrady, Christine Suma, Arkela Winston, and Amy Hudock were intervening Defendants-Appellants in the courts below and are filing a separate petition for a writ of certiorari.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceedings and Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	vi
Table of Appendices	ix
Opinions Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	2
A. Ohio's Response to the Educational Crisis in the Cleveland Public School District	3
B. Plaintiffs' State Court Challenge to the Program	9
C. Proceedings Below	11
1. Proceedings in the District Court, Court of Appeals and this Court Concerning Preliminary Injunctive Relief	11
2. Proceedings in the District Court Concerning Summary Judgment	13

Contents

Page

3. Proceedings in the Court of Appeals Following Summary Judgment 13

Reasons for Granting the Writ 14

I. The Decision Of The Sixth Circuit Conflicts With The Decisions Of The Highest Courts In Three States 14

II. The Sixth Circuit Expressly Recognized The Widespread, Serious Concerns And Precedential Significance Of This Constitutional Question 16

III. The Petition Should Be Granted So This Court May Correct The Error Caused By The Sixth Circuit's Rigid Adherence To *Nyquist* And Misapplication Of The Prevailing Establishment Clause Jurisprudence 17

A. Establishment Clause Jurisprudence Since *Nyquist* 17

B. The Program Satisfies the "Three Primary Criteria" Set Forth in *Agostini* for Assessing the Constitutionality of Educational Assistance Programs 23

1. The Scholarship and Tutorial Funds Are Distributed for the Benefit of All Underprivileged Schoolchildren Residing in the Cleveland Public School District on the Basis of Neutral Criteria 24

Contents

Page

2. The Program Does Not Result in Governmental Indoctrination 25

3. The Program Does Not Result in Excessive Entanglement 26

C. *Nyquist* Should Not Control This Case . 28

Conclusion 30

TABLE OF CITED AUTHORITIES

Page

Cases:

Agostini v. Felton, 521 U.S. 203 (1997) 15, 21, 22, 23, 24, 25, 26, 27, 28

Aguilar v. Felton, 473 U.S. 402 (1985), *overruled*, 521 U.S. 203 (1997) 21

Campbell v. Manchester Board of School Directors, 641 A.2d 352 (Vt. 1994) 15

Committee for Public Education v. Nyquist, 413 U.S. 756 (1973) 13, 14, 17, 18, 19, 20, 22, 28, 29

Jackson v. Benson, 570 N.W.2d 407 (Wis. Ct. App. 1997) 15

Jackson v. Benson, 578 N.W.2d 602 (Wis. 1998), *cert. denied*, 119 S. Ct. 466 (1999) 14, 15

Lemon v. Kurtzman, 403 U.S. 602 (1971) 21, 22, 23, 26, 27

Mitchell v. Helms, 530 U.S. __, 120 S. Ct. 2530 (2000) 22, 23, 28

Mueller v. Allen, 463 U.S. 388 (1983) ... 15, 18, 20, 28, 29

Simmons-Harris v. Goff, 1997 Ohio App. LEXIS 1766 *8 (Franklin Cty. May 1, 1997) 9

Simmons-Harris v. Goff, 711 N.E.2d 203 (Ohio 1999) 10, 11, 12, 16

Cited Authorities

Page

Witters v. Washington Department of Services for the Blind, 474 U.S. 481 (1986) ... 19, 20, 22, 24, 25, 28, 29

Zobrest v. Catalina Foothills Sch. Dist., 963 F. 2d 1190, 1192 (9th Cir. 1992), *rev'd*, 501 U.S. 1 (1993) 20, 21, 22, 28, 29

United States Constitution:

First Amendment ..... i, 1, 2, 3, 14, 20

Statutes:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 11

Ohio Rev. Code §§ 3313.974-3313.979 ..... 2, 4

Ohio Rev. Code § 3313.975 4

Ohio Rev. Code § 3313.976(A) 4

Ohio Rev. Code § 3313.976(A)(4) 5

Ohio Rev. Code § 3313.976(A)(8) 4, 5

Ohio Rev. Code § 3313.976(C) 4

Ohio Rev. Code § 3313.977(A) 5

Ohio Rev. Code § 3313.977(A)(1)(c) 5

Cited Authorities

	Page
Ohio Rev. Code § 3313.977(A)(1)(d)	10
Ohio Rev. Code § 3313.978(A)	5
Ohio Rev. Code § 3313.978(B)	4, 5
Ohio Rev. Code § 3313.979	27
Ohio Rev. Code § 3313.979(B)	9
Ohio Rev. Code §§ 3314.01, *et seq.*	4, 5
Rule:	
United States Supreme Court Rule 14(1)(i)	1
Other Authority:	
Page's Ohio Revised Code 1999 Bulletin #4, at pg. 350, H 282 § 4.34	4

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Sixth Circuit Dated, Decided And Filed December 11, 2000 ..... 1a

Appendix B — Relevant Codes 63a

Appendix C — Relevant Affidavits 80a

Hanna Perkins School, Ivy Chambers, Carol Lambert, Our Lady of Peace School, Westpark Lutheran School Association, Inc., Lutheran Memorial Association of Cleveland and Delores Jones respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 234 F.3d 945 (6th Cir. 2000) and appended at Hanna Perkins Pet. App. 1a-62a.[1] The order of the United States Court of Appeals for the Sixth Circuit denying the petitions for rehearing and suggestions for rehearing *en banc* is appended to the State's Petition for a Writ of Certiorari at App. pp. 166a-167a. The opinion of the district court is reported at 72 F. Supp. 2d 834 (N.D. Ohio 1999) and is also appended to the State's Petition for a Writ of Certiorari at App. pp. 61a-126a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on December 11, 2000. Petitioners' timely petition for rehearing and suggestion for rehearing *en banc* was denied on February 28, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part that "Congress shall make no law

1. The Appendix to this Petition contains the decision of the Sixth Circuit, the Ohio Statutory provisions pertinent to this case, and the forty-six affidavits filed by Petitioners herein in the courts below. Petitioners will refer to the Appendix to the Petition for a Writ of Certiorari filed by the Attorney General of Ohio for the remaining materials listed in Rule 14(1)(i) of the Rules of the Supreme Court of the United States.

respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. Const. Amend. I. Due to the length of the statutory provisions pertinent to this case, the text thereof is set forth at Hanna Perkins Pet. App. 63a-79a. Those provisions are Ohio Rev. Code §§ 3313.974-3313.979.

STATEMENT OF THE CASE

Petitioners herein fall into two categories: (1) religious and secular schools registered to participate in the Ohio Scholarship and Tutorial Program (the "Program"), Ohio Rev. Code §§ 3313.974-3313.979, and (2) parents whose children have been awarded scholarships and are enrolled in alternative schools in the City of Cleveland, Ohio.[2] The Program has been in existence in essentially the same form since 1995. It benefits

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2. There are three separate Petitions for a Writ of Certiorari which seek a review of a consolidated order issued by the United States Court of Appeals for the Sixth Circuit. Petitioners herein include the following: **Hanna Perkins School**, a private, non-sectarian school which receives funding from various sources including The United Way of Cleveland; **Westpark Lutheran School Association**, supported by Lutheran congregations, which offers alternative educational experiences at four facilities serving Cleveland's Westpark community for children in grades K-8; **Lutheran Memorial Association of Cleveland, Ohio, Inc.**, sponsored by three Lutheran congregations and which offers educational opportunities to children in K-8 in the Cleveland area; **Our Lady of Peace School**, affiliated with Our Lady of Peace Catholic Parish in Cleveland, which works in conjunction with parents in the community in offering an alternative educational opportunity for children in grades K-8; and **Ms. Ivy Chambers, Ms. Carol Lambert, and Ms. Delores Jones,** adult residents of Cleveland, Ohio, eligible on the basis of low family income to participate in the Scholarship Program and whose children are receiving scholarship grants under the Program.

The other two petitions are filed on behalf of: (1) Dr. Susan Tave Zelman; the State of Ohio through its General Assembly, Governor and other agents; and Sandra Berry (the "State Petitioners"); and (2) Senel Taylor, Johnnietta McGrady, Christine Suma, Arkela Winston, and Amy Hudock (the "Taylor Petitioners").

thousands of underprivileged children selected by lottery and without reference to religion by enabling their parents to independently select a school best suited to satisfy their educational needs.

Notwithstanding a contradictory decision of the highest court of the State of Ohio, the Sixth Circuit held that the Program violates the Establishment Clause of the First Amendment. The effect of the decision below, if not reversed, will be: (1) to reinstate financial barriers to educational choice for low income, inner-city public school Cleveland parents, (2) to discriminate against schoolchildren solely on the basis of their families' constitutionally protected decision to choose a state-accredited education under religious sponsorship, and (3) to abolish a state program of neutral educational assistance to a broad class of low income citizens defined without reference to religion.

A. Ohio's Response to the Educational Crisis in the Cleveland Public School District

The Program was enacted in response to a Cleveland educational and fiscal crisis so severe that it is perhaps unprecedented in American History. R. 34 Hanna Perkins Opp. to TRO pg. 20. On March 3, 1995, the United States District Court for the Northern District of Ohio ordered the State to take over the administration of the district. This Pilot Program was adopted by the Ohio General Assembly on June 28, 1995, and signed by Governor Voinovich on June 30, 1995. The Program is a unique and creative legislative enactment designed to permit low income public school parents to choose an alternative to their failing school system — a system where children were dropping out of school and couldn't pass Proficiency Tests, graduation rates were low, and attendance and drop-out rates alarmingly high. R. 96 State's S.J. Motion Apx II Exh. I pp. 1, 2.

The General Assembly sought help from the most likely sources: neighboring public school districts, tutorial service organizations, non-public schools without religious sponsorship,

religiously sponsored non-public schools and later charter schools. Ohio Rev. Code §§ 3314.01, *et seq.* The Program, which is codified at Ohio Rev. Code §§ 3313.974-3313.979, provides for periodic evaluation of performance and achievement results. Page's Ohio Revised Code 1999 Bulletin #4, at pg. 350, H 282 § 4.34 (quoted following R.C. § 3313.975). These evaluations should help educators determine the relative merits of the public school tutorial option and the alternate Scholarship choice grants. If choice proves more effective, the public schools themselves could offer even greater choice among reasonable attendance areas. If tutorial assistance proves more effective, the State will undoubtedly expand that option in the Cleveland District and perhaps to other troubled areas of the State.

The Program specifically calls for:

1. Special tutorial assistance grants for public school children in a number equal to the alternate choice scholarship grants awarded to pupils selecting alternate schools. R.C. § 3313.978(B).

2. Scholarship choice grants for low-income pupils which could be utilized at:

   a. Non-public schools without religious affiliation. R.C. § 3313.976(A).

   b. Religiously sponsored non-public schools. R.C. § 3313.976(A).

   c. An adjacent public school that charges out-of-district tuition.[3] R.C. § 3313.976(C).

3. Increased parental involvement in their children's education by permitting ten percent (10%) of alternate school tuition to be met by in-kind parental services. R.C. § 3313.976(A)(8).

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3. Thus far, no adjacent public school district has elected to participate in the Program, even though the legislation provides additional financial incentives for them to do so.

4. Low-income disadvantaged pupil admission preference to insure that those with greatest need will have an opportunity to select a preferred registered non-public school. R.C. § 3313.977(A)(1)(c).

5. Lower scholarship grants for pupils selecting religiously sponsored non-public schools. Scholarships limited to ninety (90%) percent of existing tuition. R.C. § 3313.978(A).

6. Restrictions against special tuition increases to insure against financial benefit to any religiously sponsored non-public school. R.C. § 3313.976(A)(8).[4]

7. Prohibition of admission restrictions based on religion. R.C. § 3313.976(A)(4).

3,761 students received Scholarship grants during the 1999-2000 school year. R. 131 Order pg. 3. This means that an equal number of public school pupils became entitled to tutorial assistance grants. R.C § 3313.978(B). The alternate choice Scholarships were awarded by lottery and without regard to religion. R.C. § 3313.977(A). Since the Program addresses primarily the needs of inner-city public school pupils, it is not surprising that non-public schools registered to participate in the Program enroll high percentages of minority pupils, pupils not of the same faith as the sponsoring religious organization and pupils from economically depressed neighborhoods. For example, even though Petitioner Our Lady of Peace School, is sponsored by the Catholic Church:

> 99% of our children are minority pupils. At least one-half of the families are at or below poverty level.

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4. Additional choice option was later provided by R.C. § 3314.01, *et seq.*, which has created Community schools not operated by local public school districts.

> 85% of the pupils are not of the Catholic faith. * * * Approximately 50% of the teachers at our institution are not of the Catholic faith.

R. 34 Hanna Perkins Opp. to TRO Exh. 1, pg. 1.

To be sure, a large number of religiously sponsored schools have registered to participate in the Program.[5] Yet, these inner-city Scholarship schools are a "different breed of cat." For example, the percentages in ten of the more diversified schools sponsored by one of the alternative choice systems are as follows:

School Name	Percentage of Enrolled Pupils not of the Same Religious Faith as the Sponsor
Our Lady of Peace	92.79%
St. Thomas/St. Philip	96.30%
St. Joseph Collinwood	93.48%
Archbishop-St. Timothy	92.34%
Archbishop-St. Catherine	90.29%
St. Adalbert	91.82%
Archbishop-St. Henry	89.93%
St. Francis	88.81%
St. Agatha-Aloysius	86.67%
Holy Redeemer	72.00%

R. 113 S.J Memo Exh. 2 pg. 2; Hanna Perkins Pet. App. 146a.

5. Ten of the alternative choice schools are secular. The remaining choice alternatives are sponsored by different religious organizations. *See* Affidavit of Donald J. Mooney, Jr., Volume I at Exhibit AA (filed July 29, 1999).

The State of Ohio extensively regulates the secular educational content in those schools. Exhibit 1 to Intervening Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment sets forth dozens of statutory sections regulating such things as minimum secular educational standards, certification/licensure of teachers, courses to be taught, proficiency testing, chartering of the schools, annual reports by the schools, minimum attendance and school year requirements, non-public diploma and graduation requirements and post-secondary enrollment options. R. 113 S.J. Memo Exh. 1.

Although the Cleveland Public School District was struggling under very trying and difficult demographic and financial circumstances, the State was able to permit public school pupil Scholarship enrollment in non-public schools with confidence in the superior secular academic achievements at those institutions. For example, paragraphs 6 and 7 of the Jurkowitz Affidavit reveal:

> 6. The Ohio 1999 Proficiency Test results comparing Diocese of Cleveland, State of Ohio public schools and Cleveland Public School District schools is as follows:

RESULTS OF THE MARCH, 1999 OHIO PROFICIENCY TEST (taken by pupils during 8th grade)					
	Writing	**Reading**	**Math**	**Citizenship**	**Science**
Diocese of Cleveland	94%*	95%	75%	88%	82%
State of Ohio Public Schools	86%	84%	61%	71%	69%
Cleveland Public School District	57%	57%	22%	40%	28%

* 94% of the eighth graders in the Diocese of Cleveland passed the writing test.

7. An accurate chart reflecting how the Diocese of Cleveland pupils scored in relation to their national public and non-public school counterparts is as follows:

IOWA TEST OF BASIC SKILLS (taken in 1999)			
	Grade 3	**Grade 5**	**Grade 7**
Reading	91 % *	93 %	95 %
Language	89 %	90 %	95 %
Mathematics	89 %	90 %	93 %
Social Studies	91 %	88 %	95 %
Science	88 %	87 %	94 %
Math Computation	89 %	90 %	93 %

* 91% of the students in the third grade in the Diocese of Cleveland scored in the top 25% on the reading test.

R. 113 S.J. Memo Exh. 2 pg. 2, 3; Hanna Perkins Pet. App. 147a-148a.

The 46 Affidavits filed with the Hanna Perkins School, *et al.* Defendants-Intervenors' Memorandum Contra Plaintiffs' Motion for Summary Judgment reflect the satisfaction of Scholarship parents with the results of their independent choices and the improved academic and behavioral achievements experienced by their children in the alternate choice environment. Hanna Perkins Pet. App. 80a-188a.

The Program reflects the General Assembly's special incentives for choice of a public school in a neighboring district. Pupils who made such a choice would not only present a $2250 Scholarship grant to the neighboring public school, but that school would additionally receive approximately $4,000, the total amount of State aid granted for pupils remaining in public schools. R.C. § 3313.979(B); R. 113 S.J. Memo Exh. 2 pp. 1-2; Hanna Perkins Pet. App. 145a-146a.

B. Plaintiffs' State Court Challenge to the Program

In January 1996, Plaintiffs, who are Respondents herein, filed complaints in the Franklin County, Ohio, Court of Common Pleas seeking a declaratory judgment that the Program was unconstitutional under the Establishment Clause and a number of provisions of the Ohio Constitution. The state court cases were consolidated, and decided on cross-motions for summary judgment. On July 31, 1996, the trial court held that the Program was constitutional in all respects. *Simmons-Harris v. Goff*, 1997 Ohio App. LEXIS 1766 *8 (Franklin Cty. May 1, 1997).

Plaintiffs appealed. On May 1, 1997, the Court of Appeals of Ohio, Tenth Appellate District, Franklin County, reversed the trial court's decision. *Id.* at **41-42. The court of appeals concluded that the Program violated the religion clauses of the U.S. and Ohio Constitutions and the Uniformity Clause of the Ohio Constitution. *Id.* The Ohio Supreme Court accepted jurisdiction. On May 27, 1999, the Ohio Supreme Court issued a judgment holding that the Program as enacted in 1995 violated

the "one-subject" rule of the Ohio Constitution. *Simmons-Harris v. Goff*, 711 N.E.2d 203, 216 (Ohio 1999). However, a majority of the justices rejected Plaintiffs' claims that the program violated the Establishment Clause. *Id.* at 207-11, 218-19. The majority concluded that the Program does not create an unconstitutional link between government and religion, and specifically held:

> The primary beneficiaries of the [Program] are children, not sectarian schools. *Zobrest*, 509 U.S. at 12, 113 S.Ct. at 2469, 125 L.Ed.2d at 13. For purposes of Establishment Clause analysis, the institutions that are benefited are nonpublic sectarian schools. However, the nonpublic sectarian schools that admit students who receive scholarships from the [Program] do not receive the money directly from the state. The aid provided by the state is received from the parents and students who make independent decisions to participate in the [Program] and independent decisions as to which registered nonpublic school to attend. See *Witters*, 474 U.S. at 488, 106 S.Ct. at 752, 88 L.Ed.2d at 855. Given the indirect nature of the aid, the resulting relationship between the nonpublic sectarian schools and the state is attenuated. *Zobrest*, 509 U.S. at 8, 113 S.Ct. at 2466, 125 L.Ed.2d at 10.
>
> . . . .
>
> In sum, there is no credible evidence in the record that the *primary* effect of the [Program] is to advance religion.

Simmons-Harris, 711 N.E.2d at 211 (emphasis in original).[6]

6. It should be noted that the Ohio Supreme Court concluded that one discrete provision of the Scholarship legislation — R.C. § 3313.977(A)(1)(d) — favored religion and, therefore, violated (Cont'd)

Following this state court litigation, the Ohio General Assembly re-enacted the Program in a manner remedying the "one-subject" problem. The Program as re-enacted is in all relevant respects the same as the original Program enacted in 1995.

C. Proceedings Below

1. *Proceedings in the District Court, Court of Appeals and this Court Concerning Preliminary Injunctive Relief*

Having selected the Ohio forum, and then dissatisfied with the consequences, Doris Simmons-Harris, Marla Franklin, and Steven Behr (the "Simmons-Harris Plaintiffs") filed suit on July 20, 1999, in the United States District Court, Northern District of Ohio, in Case No. 1:99cv1740, against Dr. Susan Tave Zelman in her official capacity as Superintendent of Public Instruction for the Ohio Department of Education. The Simmons-Harris Plaintiffs sought to enjoin the Program on the ground that it violated the Establishment Clause. On July 29, 1999, Sue Gatton, Mary Murphy, Michael Debose, Cheryl Debose, Glen Altshculd and Deidra Pearson (the "Gatton Plaintiffs") filed suit in the same court in Case No. 1:99cv1818 against Dr. Zelman in her official capacity; the State of Ohio through its General Assembly, Governor and other agents; and Saundra Berry, in her official capacity as Program Administrator of the Ohio Pilot Scholarship and Tutorial Program. The Gatton Plaintiffs sought the same injunctive relief requested by the Simmons-Harris Plaintiffs. The basis for federal jurisdiction in each case was 28 U.S.C. § 1331.

(Cont'd)
the Establishment Clause. *See Simmons-Harris v. Goff*, 711 N.E.2d at 210. The court proceeded to sever that particular provision from the remainder of the statutory scheme. *Id.*

Two groups of intervenors, including Petitioners herein, who had intervened in the state court proceeding successfully intervened in the Simmons-Harris action in order to represent non-public school and non-public school parent interests in this litigation. Intervenors Senel Taylor, Johnnietta McGrady, Christine Suma, Arkela Winston, and Amy Hudock, on their own behalf and as natural guardians of their respective children, filed an answer to the Simmons-Harris complaint on July 27, 1999. Petitioners herein filed an answer to the same complaint on August 2, 1999.

On August 13, 1999, the district court held a preliminary injunction hearing in both cases, and on August 24, 1999, granted Plaintiffs the injunctive relief sought. In the same order, the district court consolidated the two cases and found that the Ohio Supreme Court's decision in *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999), did not preclude federal consideration of the constitutional challenge to the Program. The same date that the district court granted Plaintiffs' motion for a preliminary injunction, the State and the Intervenors appealed that decision to the Sixth Circuit. After the district court's August 27, 1999, order granting a limited stay of its preliminary injunction, the State and the Intervenors filed revised briefs with the Sixth Circuit, appealing the preliminary injunction with regard to students who were new to the Program. While those appeals remained pending, without Court action, the State filed a motion for stay of the preliminary injunction with this Court, which was granted on November 5, 1999, pending the Sixth Circuit's final disposition of the entire appeal. *See Simmons-Harris v. Zelman*, 120 S. Ct. 443 (1999). Thereafter, the Sixth Circuit entered an order on November 15, 1999, concluding that this Court's order rendered moot the pending motions for a stay in the Sixth Circuit. The case proceeded in the district court on an expedited basis.

2. *Proceedings in the District Court Concerning Summary Judgment*

All parties, except for Petitioners herein, filed motions for summary judgment on November 1, 1999. In opposition to Plaintiffs' Motion for Summary Judgment, Petitioners herein presented 46 additional affidavits providing detailed facts concerning: (1) the alternative educational choices carefully exercised by the Scholarship Parents; (2) the significant variances in educational philosophies and approaches found even among religiously sponsored schools,[7] (3) the integration of scholarship children of varying religious faiths and cultural backgrounds into the participating schools, (4) the special needs of most scholarship children, (5) the remedial educational plans designed to meet these children's needs, and (6) the extent to which the Program provides neutral benefits to a broad class of families who were selected by lottery and without reference to religion.

The district court granted Plaintiffs' motion for summary judgment on December 20, 1999, finding that the Program violated the Establishment Clause. The court's order enjoined the State from administering the Program, but the court stayed its summary judgment order pending review by the Sixth Circuit. Petitioners appealed to the Sixth Circuit on January 12, 2000.

3. *Proceedings in the Court of Appeals Following Summary Judgment*

The Sixth Circuit affirmed, but stayed the injunction entered below pending the filing of petitions for certiorari. Relying primarily on *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), the court held that the Program violated the

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7. For example, one school labeled by Plaintiffs as religiously sponsored (Birchwood School) has no prayer sessions, no religion classes or exercises, and no religious affiliation. However, it leases a building from a religious organization. *See* R. 113, S.J. Memo Exh. 17; Hanna Perkins Pet. App. 118a-120a.

Establishment Clause because it "has the primary effect of advancing religion, and . . . constitutes an endorsement of religion and sectarian education . . . ." The Sixth Circuit read *Nyquist* as "the most persuasive [Establishment Clause case], in that it is on point with the matter at hand . . . ." Hanna Perkins Pet. App. 13a-14a. The Sixth Circuit acknowledged, however, that this Court "has revisited many of the issues raised in *Nyquist*," but insisted that this Court "has refrained from overruling *Nyquist*, and has instead distinguished various cases on the basis of their facts . . . ." *Id.* at 17a. The Sixth Circuit then conducted a review of "relevant case law to assist us by analogy in analyzing the factual discrepancies between this case and *Nyquist*." *Id.*

In his separate opinion, which concurred in part and dissented in part with the majority's holding, Judge Ryan wrote that "[i]t is impossible to take seriously the majority's claim that *Nyquist* governs our result and, *for that reason*, requires that the Ohio voucher program must be struck down." (emphasis in original). Judge Ryan specifically took issue with the majority's reading of *Nyquist* by noting, "[i]n my judgment, the majority is mistaken as a matter of *fact* (the two statutes are totally different) and as a matter of *law* (the relevant Establishment Clause jurisprudence has changed since *Nyquist*)." (emphasis in original).

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE SIXTH CIRCUIT CONFLICTS WITH THE DECISIONS OF THE HIGHEST COURTS IN THREE STATES

In 1998, the Supreme Court of Wisconsin, voting four to two, held that the Milwaukee Parental Choice Program did not violate either the Wisconsin Constitution or the Establishment Clause of the First Amendment. *See Jackson v. Benson*, 578 N.W.2d 602, 632 (Wis. 1998), *cert. denied*, 119 S. Ct. 466

(1999).[8] First, the court concluded that the program had a secular purpose: helping low income parents choose alternative schools. *See id.* at 612. Second, the court analyzed decisions rendered by this Court through *Agostini* and concluded:

> that state educational assistance programs do not have the primary effect of advancing religion if those programs provide public aid to both sectarian and nonsectarian institutions (1) on the basis of neutral, secular criteria that neither favor nor disfavor religion; and (2) only as a result of numerous private choices of the individual parents of school-age children.

Id. at 617. Third, the court concluded that there was no excessive entanglement because there was no increased state supervision of private schools participating in the program. *See id.* at 619-20.

Similarly, in *Campbell v. Manchester Board of School Directors*, 641 A.2d 352 (Vt. 1994), the Vermont Supreme Court held that Vermont's tuition reimbursement program was lawful under the Establishment Clause. The court specifically found the "case to be governed by *Mueller* and *Witters* and not by *Nyquist*." 641 A.2d at 360. The court further concluded that because the tuition reimbursement program applied to all students regardless of whether they were enrolled in public or private school, it " 'neutrally provides state assistance to a broad spectrum of citizens [and] is not readily subject to challenge under the Establishment Clause.' " *Id.* (quoting *Mueller*, 463 U.S. at 398-99).

Lastly, as noted above, the Supreme Court of Ohio squarely concluded that the Program at issue herein fully comports with

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8. Wisconsin's voucher program, which focuses on resolving problems in urban schools, began in Milwaukee in 1990. The legislature limited participation to students whose family income did not exceed 175% of the official poverty rate. *See Jackson v. Benson*, 570 N.W.2d 407, 411-12 (Wis. Ct. App. 1997).

the Establishment Clause. *Simmons-Harris v. Goff*, 711 N.E.2d 203, 211 (Ohio 1999). The Ohio court's holding rests upon three grounds. First, there was no evidence that Ohio was helping sectarian schools indoctrinate students. *Id.* at 209. Second, with one exception, which the court severed from the statute, allocation of the money did not define beneficiaries by religion. *Id.* at 210. Finally, there was no entanglement of church and state because the money went to the parents for the benefit of the children and not to the school, and because state supervision was minimal. *Id.* at 211.

The decisions of the state supreme courts set forth above and the Sixth Circuit cannot be squared. The manifest conflict between the decisions warrants review and, therefore, the Petition should be granted.

II. THE SIXTH CIRCUIT EXPRESSLY RECOGNIZED THE WIDESPREAD, SERIOUS CONCERNS AND PRECEDENTIAL SIGNIFICANCE OF THIS CONSTITUTIONAL QUESTION

The Sixth Circuit stated:

> We recognize the significance that this issue holds for many members of our society. The issue of school vouchers has been the subject of intense political and public commentary, discussion, and attention in recent years, and we would be remiss if we failed to acknowledge the seriousness of the concerns this case has raised.

Simmons-Harris v. Zelman, 234 F.3d 945, 951 (6th Cir. 2000). In the final paragraph of the majority opinion, the Sixth Circuit again noted: "We recognize the importance of this case and the precedential value it espouses." *Id.* at 962-63.

III. THE PETITION SHOULD BE GRANTED SO THIS COURT MAY CORRECT THE ERROR CAUSED BY THE SIXTH CIRCUIT'S RIGID ADHERENCE TO *NYQUIST* AND MISAPPLICATION OF THE PREVAILING ESTABLISHMENT CLAUSE JURISPRUDENCE

Throughout this litigation, Plaintiffs have argued that the constitutionality of the Program is controlled by this Court's decision in *Nyquist*. The Petition should be granted so this Court can lay to rest any further suggestion that *Nyquist* calls for the constitutional rejection of all voucher and scholarship programs regardless of factual dissimilarities. By granting the Petition, this Court can confirm that the evolution of Establishment Clause jurisprudence since *Nyquist* renders that decision inapposite both factually and as a matter of law.

A. Establishment Clause Jurisprudence Since *Nyquist*

In assessing the continued precedential value, if any, of *Nyquist*, it is important to note what this Court held and what it did not. It is also important to review the *Nyquist* decision in its proper historical context. The *Nyquist* Court specifically referenced the factual context in which New York's financial aid programs for non-public elementary and secondary schools were enacted in 1972. The New York legislation contained "legislative findings" which concluded that:

> The "fiscal crisis in nonpublic education . . . has caused a diminution of proper maintenance and repair programs, threatening the health, welfare and safety of nonpublic schoolchildren" in low-income, urban areas; and that "a healthy and safe school environment" contributes to the stability of urban neighborhoods."

Nyquist, 413 U.S. at 763-64 (citations omitted). However, the *Nyquist* Court found that "the effect of the aid is unmistakably

to provide desired financial support for nonpublic, sectarian institutions." *Id.* at 783.

Implicitly recognizing the limits of its holding, the *Nyquist* Court reserved an important question for future decision. It expressly stated that it "need not decide whether the significantly religious character of the statute's beneficiaries might differentiate the present cases from a case involving some form of public assistance made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." *Id.* at 783 n.38. That reservation is the critical distinction between *Nyquist* and later cases involving benefits made available to a class of potential recipients far broader than the situation presented in 1973.

Five cases decided subsequent to *Nyquist* demonstrate this Court's current approach to Establishment Clause challenges. In *Mueller v. Allen*, 463 U.S. 388 (1983), this Court reviewed a Minnesota tax deduction program for educational expenses, available to parents of both public and non-public school children. Notwithstanding the fact that 90% of the actual financial benefit of the program went to parents whose children attended religious schools, this Court rejected an Establishment Clause challenge. In reaching its decision, this Court noted that the Minnesota statute permitted "all parents" to deduct their children's expenses whether those children attended public or non-public schools. *Id.* at 399. Signaling its recognition of the limitations of *Nyquist*, the *Mueller* Court cited footnote 38 in *Nyquist* and emphasized the breadth and availability of the Minnesota tax deduction. *Id.* at 398. Although it noted that "financial assistance provided to parents ultimately has an economic effect comparable to that given directly to the schools attended by their children," this Court expressly recognized that the money is expended by the parents, not by the State, through "numerous private choices of individual parents." *Id.* at 399.

In 1986, this Court continued to draw lines based upon the facts in *Nyquist*. *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), concerned a broad scholarship program developed by the State of Washington. The program provided scholarships to all post-secondary students if: (1) they were disabled and (2) the aid would be spent at an accredited educational institution. *See id.* at 488. The disabled student at issue chose to spend his educational assistance at the Inland Empire Bible College in order to become a minister. *See id.* at 488-89.

The *Witters* Court had little trouble concluding that Washington's program had a valid purpose — to improve the education of disabled students. *See id.* at 485-86. In applying the "primary effect" prong of the prevailing Establishment Clause test, this Court stated that it is "well settled that the Establishment Clause is not violated every time money previously in the possession of a State is conveyed to a religious institution." *Id.* at 486. This Court's inquiry focused on the fact that the assistance was paid directly to the student who transmits it to the educational institution of his or her choice. "Any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." *Id.* at 487. This Court thus rejected the assertion that the aid was "skewed towards religion." *Id.* at 488. Accordingly, because the Washington program provided a broad range of educational choices to scholarship recipients and was designed to operate on a religiously neutral basis, this Court determined that there was no unconstitutional assistance to religion.

Perhaps the most significant aspect of *Witters* for purposes of this Petition is the fact that this Court reviewed the constitutionality of the Washington program as a whole, rather than considering small portions of the program in isolation. Using this "whole program" approach, this Court found Washington's legislation to be a neutral, broadly available

governmental program, intended to reduce the educational expenses incurred by any disabled student, and created no incentive to choose any particular educational institution.

Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993), follows the logic and reasoning of *Mueller* and *Witters*, and thus continues to distinguish *Nyquist* based upon the particular facts in that case. Indeed, the *Zobrest* Court relied on footnote 38 in *Nyquist* to distinguish governmental programs specifically targeted at providing educational assistance to parents who choose religiously affiliated schools from broad, neutral programs in which aid recipients may or may not attend religiously affiliated schools. *See id.* at 10. At issue in *Zobrest* was the Individuals with Disabilities Education Act ("IDEA"), which provided for federally and state supported special educational assistance to qualified disabled students who were properly enrolled in accredited educational institutions. The public school district in question informed the parents of a deaf student that the district would provide the educational assistance in any educational environment except for a religiously affiliated school. *See Zobrest v. Catalina Foothills Sch. Dist.*, 963 F. 2d 1190, 1192 (9th Cir. 1992), *rev'd*, 509 U.S. 1 (1993). The parents challenged the school district's decision alleging that the IDEA and the Free Exercise Clause of the First Amendment required the district to provide a sign-language interpreter to accompany their child to classes at a Roman Catholic high school and that the Establishment Clause did not bar such aid.

The *Zobrest* Court upheld the constitutionality of the provision of IDEA assistance to the deaf student. It specifically found that the aid in question was made available "without regard to the sectarian-nonsectarian or public-nonpublic nature of the school the child attends." *Zobrest*, 509 U.S. at 10. Under the IDEA, the government would provide educational assistance made necessary because of the special needs of the child. Because the program placed no restrictions on the schools that parents may select, this Court concluded that the program was

neutral by design in that it was broadly available to all parents regardless of the educational institution chosen. Moreover, it created no financial incentive to choose a religious school over a public school. The eventual receipt of the aid money by the various institutions was the result of the parent's genuinely independent choices — not the result of a state mandate. *Id.*

In *Agostini v. Felton*, 521 U.S. 203 (1997), the Court reexamined its Establishment Clause jurisprudence as it applied to the Elementary and Secondary Educational Act of 1965. In pertinent part that Act provided that children residing in low-income areas who were educationally deprived could qualify for remedial assistance in English and Mathematics at public expense regardless of the school that their parents chose for them.[9] In determining the constitutionality of the program, this Court continued to follow certain traditional Establishment Clause guideposts,[10] but specifically noted that its "understanding of the criteria used to assess whether aid to religion has an impermissible effect" had certainly evolved. *Agostini*, 521 U.S. at 223. The *Agostini* Court reaffirmed that its analysis still requires determination "whether the government acted with the purpose of advancing or inhibiting religion" and

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9. That program had been provided on the premises of non-public, including religiously affiliated, schools until 1985. The Supreme Court in *Aguilar v. Felton*, 473 U.S. 402 (1985), *overruled*, 521 U.S. 203 (1997), ruled that the program as then administered was unconstitutional. In so ruling, the *Aguilar* Court relied on a series of presumptions, which lacked any support in the record, about the nature of the program and a supposed tendency of public employees to be altered by a "pervasively sectarian atmosphere" to promote religious messages.

10. In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), this Court recited its well known three-pronged test for Establishment Cause analysis: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.' " *Lemon*, 403 U.S. at 612-13 (citations omitted).

whether the aid has the 'effect' of advancing or inhibiting religion." *Id.* at 222-23.[11] With respect to the latter inquiry, this Court articulated "Three Primary Criteria" used to determine whether government aid is permissible: "It does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement." *Id.* at 234.

Citing *Witters*, *Zobrest*, and footnote 38 in *Nyquist*, the *Agostini* Court stated that it did not adhere to a bright line rule that any or all "government aid that directly aids the educational function of religious schools is invalid." *Id.* at 225-26. This Court determined that the public aid was made available on an even-handed basis to qualified individuals and that the aid found its way indirectly to religiously affiliated schools "only as a result of the genuinely independent and private choices of individuals." *Id.* at 226. Significantly, this Court stated that it was not "willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid." *Id.* at 229.

Last term, in *Mitchell v. Helms*, 530 U.S. __, 120 S. Ct. 2530 (2000), the Court reviewed a challenge to an aid program described as a "close cousin" to the provision at issue in *Agostini*. *Mitchell*, 530 U.S. at __, 120 S. Ct. at 2537. Chapter 2 of the federal Education Consolidation and Improvement Act of 1981, among other things, provides aid for certain instructional

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11. Merging the analysis of excessive government entanglement into the "primary effect" analysis, the Court stated:

> Regardless of how we have characterized the issue, however, the factors we use to assess whether an entanglement is "excessive" are similar to the factors we used to examine "effect." That is, to assess entanglement, we have looked to "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority."

Id. at 232 (quoting *Lemon*, 403 U.S. at 615).

materials. 120 S. Ct. at 2537. In Jefferson Parish, Louisiana, private schools, including religious schools characterized by the district court as "pervasively sectarian," participated in the program of government aid. *Id.* at 2538.

The plurality opinion reaffirmed the *Agostini* refinement to the *Lemon* test and, because the secular purpose of the program and any excessive government entanglement were not the subject of controversy, focused entirely on the two remaining criteria of the *Agostini* "effect" test: whether the program results in governmental indoctrination, and whether it defines its recipients by reference to religion.

Concluding that the aid did not have "the effect of advancing religion," the plurality stated, "[the aid] does not result in governmental indoctrination, because it determines eligibility for aid neutrally, allocates that aid based on the private choices of the parents of schoolchildren, and does not provide aid that has an impermissible content. Nor does [the program] define its recipients by reference to religion." *Mitchell*, 530 U.S. at __, 120 S. Ct. at 2552. For the plurality, "the inquiry into the recipient's religious views required by a focus on whether a school is pervasively sectarian is not only unnecessary but also offensive." *Mitchell*, 530 U.S. at __, 120 S. Ct. at 2551.

B. The Program Satisfies the "Three Primary Criteria" Set Forth in *Agostini* for Assessing the Constitutionality of Educational Assistance Programs

As explained above, *Agostini* announced a refined standard for determining the "primary effect" of governmental aid directed to educational assistance programs. In place of the *Lemon* Court's "primary effect" test, the *Agostini* Court substituted inquiries into whether public aid is distributed on the basis of "criteria that neither favor nor disfavor religion," 521 U.S. at 232, and whether the aid is distributed in a form that would lead to "government inculcation of religious beliefs," *id.* at 223, or "excessive entanglement." *Id.* at 233. The Court

referred to this new inquiry as the "three primary criteria we currently use to evaluate whether government aid has the effect of advancing religion." *Id.* at 234. The Program at issue here satisfies each of these criteria, beginning with the most important: the neutrality of the Program's selection criteria.[12]

1. *The Scholarship and Tutorial Funds Are Distributed for the Benefit of All Underprivileged Schoolchildren Residing in the Cleveland Public School District on the Basis of Neutral Criteria*

This Court has held that where "aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis," it is not likely to have the effect of advancing religion. *Agostini*, 521 U.S. at 231.

This emphasis on neutrality protects several important constitutional norms. First, it maintains the distinction between governmental promotion of religion, which the Constitution proscribes, and private religious decision-making, which the Constitution safeguards. Government programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the Establishment Clause, because any aid to religion results from the "genuinely independent and private choices" of individuals, and cannot be attributed to the state. *Witters*, 474 U.S. at 487. Under the Program, the State of Ohio is entirely neutral toward religion.

Moreover, when aid is provided on a neutral basis to all schoolchildren, it avoids creating a "financial incentive" to choose religious schooling or to "modify their religious beliefs or practices in order to obtain those services." *Agostini*, 521 U.S. at 231-32. Finally, when benefits are distributed among a

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12. This Court has consistently found that educational assistance programs have a secular purpose, and Plaintiffs have not questioned the secular purpose of the Program. *See Simmons-Harris v. Zelman*, 72 F. Supp. 2d 834, 847 (N.D. Ohio 1999).

wide-array of beneficiaries on the basis of neutral and objective criteria, there is no implied "endorsement" of religion or "symbolic union" between religion and the state. *Witters*, 474 U.S. at 488-89. Neutral treatment sends no message of preferred status.

The Scholarship recipients under the Ohio Program who are selected by lottery can: (1) elect to remain in the public school and receive special tutorial assistance, (2) enroll in any one of ten private schools without religious sponsorship (3) enroll in one of the non-public schools sponsored by several different religious organizations or (4) select a new charter school that cannot be sponsored by a religious organization. The Ohio General Assembly's intent behind the Program is to benefit disadvantaged public schoolchildren by permitting them to utilize their entitlement at any state-accredited school or for tutorial assistance in the public schools. As such, the eventual receipt of the scholarship funds by the non-public schools is a result of private and independent choice, not state control. The choices made by individual parents and major considerations behind such choices are detailed in the forty-six parent and teacher affidavits found at Hanna Perkins Pet. App. 80a-188a.

2. *The Program Does Not Result in Governmental Indoctrination*

The second of the "three primary criteria" enumerated in *Agostini* requires that the aid to education must not "result in governmental indoctrination of religion." *Agostini*, 521 U.S. at 234. The "indoctrination inquiry" ensures that the government itself, and its officials and employees, do not use their official position to promote or inculcate religion. *See id.* at 234 (noting the need to "prevent or to detect inculcation of religion by public employees").

To be sure, some of the registered schools have a religious mission and include prayers, religious symbols and exercises. Plaintiffs recite from mission statements and proclaim

pervasiveness. They would have the Court ignore the affidavit evidence concerning the freedoms exercised by the scholarship recipients, the numbers of pupils and teachers in the inner city schools that are not of the same religious faith as the school sponsor, and most of all the extremely high secular educational standards and achievements at those institutions. Hanna Perkins Pet. App. 80a-188a.

In any event, it would be difficult, if not impossible, to formulate a rational litmus test to gauge how much religion in state-accredited non-public schools is too much. How many minutes of prayer would disqualify a registered school? How many icons are too many? The affidavits confirm that the degree of religiosity varies from school to school even for those under the same sponsorship. But, this case necessitates no such constitutional inquiry. Indoctrination, if any, occurs because of independent individual decisions by parents to use their children's scholarships at specific schools. The Program creates no financial incentive to undertake religious indoctrination. The indoctrination or religious message is reasonably attributable to the parents who choose a school, rather than the State that has provided neutral aid to public or non-public school parents without regard to religion.

3. *The Program Does Not Result in Excessive Entanglement*

The third "primary criterion" set forth in *Agostini* is whether the program of aid to education would "create an excessive entanglement." 521 U.S. at 234.[13] In its usual form,

13. While this new "excessive entanglement" criterion resembles the entanglement "prong" of the *Lemon* test, the *Agostini* Court made important modifications. Under prior law, entanglement could be found in three situations: (1) as a result of pervasive monitoring of religious institutions to ensure that government aid did not advance religion, (2) as a result of "administrative cooperation" between government officials and religious institutions, and (3) as a result of "political divisiveness" generated over controversial aid programs. *See Agostini*, (Cont'd)

"entanglement" involves excessive or intrusive methods of ensuring that religiously affiliated organizations comply with regulatory requirements. Instead of being concerned about the "advancement" of religion, the "excessive entanglement" inquiry focuses on the " 'danger that pervasive modern governmental power will ultimately intrude on religion.' " *Agostini*, 521 U.S. at 233 (quoting *Lemon*, 403 U.S. at 620). Therefore, the prohibition against "excessive entanglement" prevents the government from constructing aid programs in ways that intrude too far into religious autonomy.

The Program does not entail significant, and surely not excessive, entanglement. The only interaction between the state of Ohio and the participating non-public schools contemplated by the Program's legislation is the monthly reporting requirement set forth in R.C. § 3313.979, which simply provides a mechanism for monitoring the number of Scholarship recipients who are admitted to non-public schools and remain enrolled in such schools throughout the school year. Thereafter, the Program merely provides for periodic pilot evaluation of performance and achievement results by the State. This modest and unobtrusive contact between the State of Ohio and the participating non-public schools cannot rise to the level of "excessive entanglement."

When the constitutional criteria selected by this Court in *Agostini* are properly applied, the result is clear: the Program comports with the Establishment Clause.

(Cont'd)
521 U.S. at 233. The *Agostini* Court held that "the last two considerations are insufficient by themselves to create an 'excessive' entanglement, *id.* at 233-34, and it modified the first consideration to make it less absolute. *See id.* at 234 ("we have not found excessive entanglement in cases in which States imposed far more onerous burdens on religious institutions than the monitoring system at issue here").

C. *Nyquist* Should Not Control This Case

Mitchell, *Agostini*, *Zobrest*, *Witters* and *Mueller* teach that legislation calling for neutral benefits distributed to a broad class of citizens without reference to religion satisfies Establishment Clause constraints. The legislation at issue in *Nyquist* could in no way meet the "neutral benefits distributed without reference to religious beliefs" test because the benefits could not apply to public school pupils and because the qualifying institutions in *Nyquist*:

> 1. Imposed religious restrictions on admissions;
>
> 2. Imposed religious restrictions on faculty appointments;
>
> 3. Imposed religious restrictions on what or how the faculty may teach;
>
> 4. Required students to obey the doctrines and dogmas of a particular religious faith; and
>
> 5. Required pupils to attend religious activities.

Nyquist at 767, 768.

Could a public school pupil receive a tuition grant in *Nyquist*? Yes, *if* and only if he was a member of the same religious faith as the sponsor of a religiously sponsored non-public school and agreed to obey the doctrines and dogmas of a particular religious faith.

The *Nyquist* Court specifically referred to the *pertinence* of the above generalizations about the non-public schools:

> Although no record was developed in these cases, a number of *pertinent generalizations* may be made about the nonpublic schools which would benefit from these enactments. The District Court, relying on findings in a similar case recently decided by the

> same court, adopted a profile of these sectarian nonpublic schools similar to the one suggested in the plaintiffs' complaint * * *

Id. at 767 (emphasis added). The *Nyquist* Court also noted that these characterizations of the non-public schools were pleaded in the plaintiffs' complaint.

The distinctions between *Nyquist* and the instant case are telling. In *Nyquist*, a pupil had to meet religious tests to use his grant at a specific institution. In Ohio, the pupil is selected by lottery, without regard to religious persuasion or beliefs. In *Nyquist* pupils receiving grants could be required to obey the doctrines and dogmas of a particular religious faith. In Ohio, the Scholarship pupils' diverse religious affiliations are respected and there is no effort to alter them. *See* Affidavit of Thomas (R. 113 S.J. Memo Exh. 45); Hanna Perkins Pet. App. 183a-184a.

These distinctions are pertinent because, as noted above, this Court's majority opinion in *Nyquist* reserved the question of the Constitutionality of programs made available generally without regard to religion. The majority in *Mueller* reiterated that the statute at issue in *Nyquist* was stricken because the class of beneficiaries did not include all school children, those in public as well as in private schools. *Mueller*, 463 U.S. at 398. The many fundamental distinctions between the Ohio Program and *Nyquist* are also pertinent because the recent Establishment Clause jurisprudence enunciated in *Zobrest* and *Witters* stresses the importance of programs being available to public and non-public school families without regard to religion.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DATED, DECIDED AND FILED DECEMBER 11, 2000

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 00-3055/3060/3063

DORIS SIMMONS-HARRIS; MARLA FRANKLIN; STEVEN BEHR, REV.; SUE GATTON; MARY MURPHY; MICHAEL DEBOSE; CHERYL DEBOSE; GLENN ALTSCHULD; DEIDRA PEARSON,

Plaintiffs-Appellees,

v.

SUSAN TAVE ZELMAN, Superintendent of Public Instruction, State of Ohio, et al.,

Defendants-Appellants (00-3055/3060),

SENEL HERMAN TAYLOR, et al.,

Intervenors-Defendants-Appellants (00-3055),

HANNA PERKINS SCHOOL, et al.,

Intevenors-Defendants-Appellants (00-3063).

Appendix A

Appeal from the United States District Court
for the Northern District of Ohio at Cleveland.
Nos. 99-01740, 99-01818 —
Solomon Oliver, Jr., District Judge.

Argued: June 20, 2000

Decided and Filed: December 11, 2000

Before: RYAN, SILER, and CLAY, Circuit Judges.

* * *

CLAY, J., delivered the opinion of the court, in which SILER, J., joined. RYAN, J. (963-74), delivered a separate opinion concurring in part and dissenting in part.

OPINION

CLAY, Circuit Judge. Defendants and Intervenors Dr. Susan Tave Zelman, *et al.*; Senel Taylor, *et al.*; and Hanna Perkins School, *et al.*, appeal from the order entered by the United States District Court for the Northern District of Ohio, enjoining on summary judgment the Ohio Pilot Project Scholarship Program on the ground that it violates the Establishment Clause of the First Amendment. For the following reasons, we **AFFIRM.**

I.

In 1995, Ohio's General Assembly adopted the Ohio Pilot Project Scholarship Program ("voucher program" or

"the program") in response to an order by the United States District Court that placed the Cleveland School District under the direct management and supervision of the State Superintendent of Public Instruction due to mismanagement by the local school board. The voucher program covers any state school district that has been the subject of a federal court order "requiring supervision and operational management of the district by the state superintendent." Ohio Rev. Code § 3313.975(A). The program provides scholarships to children residing within the applicable district in grades kindergarten through eighth grade. *See* Ohio Rev. Code § 3313.975(C)(1). The program gives "preference to students from low-income families," defining them as those whose families' income is less than 200% of the poverty line. *See* Ohio Rev. Code § 3313.978(A). "Scholarships may be awarded to students who are *not* from low-income families *only if* all students from low-income families have been given first consideration for placement." Cleveland Scholarship and Tutoring Program, Administration Procedures Manual, 1-11 (J.A. at 1358) (emphasis original). Over sixty percent of the children receiving scholarships in the program are from families with incomes at or below the poverty line.

The voucher program pays scholarships according to family income. The program requires participating private schools to cap tuition at $2500 per student per year and pays 90% of whatever tuition the school actually charges for low-income families; for other families, the State pays 75% of the school's tuition up to a maximum of $1875. *See* Ohio Rev. Code §§ 3313.976(A)(8), 3313.978(A). Each scholarship for children attending a private school is payable to the parents of the student entitled to the scholarship. Ohio Rev.

Code § 3313.979. Scholarship checks are mailed to the school selected by the parents, where the parents are required to endorse the checks over to the school in order to pay tuition.

Schools wishing to be designated as program participants eligible to enroll scholarship students must register with the voucher program. Private schools located within the boundaries of the Cleveland school district which meet the State's educational standards may participate. *See* Ohio Rev. Code § 3313.976(A)(1) and (3). Schools are required to follow the program's priority rules regarding the placement of students and may not discriminate on the basis of race, religion, or ethnic background; advocate or foster unlawful behavior; or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion. *See* Ohio Rev. Code § 3313.976(A)(6). Public schools in districts adjacent to the district in which the voucher program is implemented may also register for the program and "receive scholarship payments on behalf of parents," but none of the public schools in districts adjacent to Cleveland have done so. Ohio Rev. Code § 3313.976(C). The checks for program participants at public schools are made out to the participating school district rather than to the parents. No public schools have registered for the program since its enactment.

For the 1999-2000 school year, 3,761 students enrolled in the program; 60% of the enrollees are from families at or below the poverty level. Of these, 3,632 (96%) are enrolled in sectarian schools. At one time in the course of the program, as many as 22% of the students enrolled in the program attended nonreligious schools. During the 1999-2000 school year, fifty-six schools registered to participate in the program;

forty-six (82%) are church-affiliated. Program monies may be used by the participating schools for whatever purpose they deem appropriate; the voucher program does not place restrictions on the use of funds made available under the program.

The sectarian schools vary in their religious affiliation and approaches; however, the handbooks and mission statements of these schools reflect that most believe in interweaving religious beliefs with secular subjects. The sectarian schools also follow religious guidelines, including instruction in religion and mandated participation in religious services; interweaving of Christian doctrines with science and language arts classes; requiring that "all learning take place in an atmosphere of religious ideals," St. Vincent de Paul School, Parent Handbook 11 (1999-2000); and designing educational scholarship in order "to make . . . faith become living, conscious, and active through the light of instruction . . . religious truths and values permeate the whole atmosphere of the school." Saint Rocco School, Parent Student Handbook 1 (1999-2000). Other sectarian schools in the voucher program believe that "the one cardinal objective of education to which all others point is to develop devotion to God as our Creator, Redeemer, and Sanctifier," Saint John Nottingham Lutheran School, Parent Handbook 2 (1999-2000); and to require students to "pledge allegiance to the Christian flag and to the Savior for whose Kingdom it stands, One Savior crucified, risen and coming again with life and liberty for all who believe." Calvary Center Academy, Parent Student Handbook 24 (1999-2000).

In prior litigation, Doris Simmons Harris, one of the Plaintiffs herein, brought a state court lawsuit challenging

the constitutionality of the voucher program under multiple provisions of the Ohio Constitution, and under the Establishment Clause of the United States Constitution. On May 27, 1999, the Ohio Supreme Court issued a judgment in favor of Plaintiffs, holding that the 1995 voucher program had been enacted in violation of the one-subject rule of the Ohio Constitution, and "must be stricken" from the Ohio statute books. *See Simmons-Harris v. Goff*, 711 N.E.2d 203, 216 (Ohio 1999). However, a majority of the justices rejected Plaintiffs' claims that the program violated the Establishment Clause. *Id.* at 207-11, 218-19. Those justices reasoned that "[t]he *Nyquist* holding [had been] undermined" by subsequent cases and was thus no longer good law. *Id.* at 208. A concurring opinion noted that "[w]ith regard to the rest of the majority opinion [the section not dealing with the one-subject rule], . . . I find a number of the other assertions by the majority to be advisory in nature." *Id.* at 216 (Douglas, J., joined by Resnick and Sweeney, JJ., concurring in the judgment only). Since this case, the Ohio Legislature has re-enacted the voucher program in a manner remedying the one-subject problem; however, the 1999 program is in all relevant aspects, the same as the original pilot scholarship program enacted by the Legislature in 1995.

On July 20, 1999, Simmons Harris, the parent of a minor child enrolled in the Cleveland City School District for the 1999-2000 school year; Marla Franklin, a teacher in the Lorain City School District; and Steven Behr, pastor of Our Savior/Nuestro Salvado Church in Lorain, Ohio, filed suit in Case No. 1:99cv1740, against Defendant Dr. Susan Tave Zelman in her official capacity as Superintendent of Public Instruction for the Ohio Department of Education, seeking

to enjoin a portion of the program on the ground that it violated the Establishment Clause of the First Amendment. On July 29, 1999, Sue Gatton, chair of Citizens Against Vouchers; Mary Murphy, a teacher in the Cleveland City School District; Michael Debose, a pastor in Cuyahoga County, Ohio; Cheryl Debose and Glenn Altschuld, Ohio Taxpayers; and Deidra Pearson, the parent of a child enrolled in the Cleveland City School District, filed suit in Case No. 1:99cv1818 against Defendants Dr. Susan Tave Zelman, in her official capacity as Superintendent; the State of Ohio through its General Assembly, Governor and other agents; and Saundra Berry, in her official capacity as Program Administrator of the Ohio Pilot Scholarship Program, seeking the same injunctive relief as in Case No. 1:99cv1740.

Proposed Intervenors Senel Taylor, Johnnietta McGrady, Christine Suma, Arkela Winston, and Amy Hudock, on their own behalf and as natural guardians of their respective children, filed an answer to Simmons Harris' complaint on July 27, 1999. Proposed Intervenors Hanna Perkins School, Ivy Chambers, Carol Lambert, Our Lady of Peace School, Westpark Lutheran School Association, Inc., Lutheran Memorial Association of Cleveland, and Delores Jones, filed an answer to Simmons Harris' complaint on August 2, 1999.

On August 13, 1999, the district court held a preliminary injunction hearing in both cases, and on August 24, 1999, granted Plaintiffs the injunctive relief sought. In the same order, the district court consolidated the two cases, and found that the Ohio Supreme Court's decision in *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999), did not preclude federal consideration of the constitutional challenge to the voucher

program because the Ohio court's decision rested on a state ground which independently supported its resolution of the case. Thereafter, on August 27, 1999, the district court granted in part Defendants' motion for a stay of the preliminary injunction.

On August 24, 1999, the same day that the district court granted Plaintiffs' motion for a preliminary injunction, the State and the two intervening Defendants appealed that decision to this Court. After the district court's August 27, 1999, order granting a limited stay of its preliminary injunction, all Defendants filed revised briefs with this Court, appealing the preliminary injunction with regard to students who were new to the voucher program — i.e., the portion of the preliminary injunction not stayed by the district court's August 27, 1999 order. While those appeals were pending, the State filed a motion for a stay of the preliminary injunction with the United States Supreme Court, which the Supreme Court granted by a vote of 5-4 on November 5, 1999, pending this Court's final disposition of the entire appeal. *See Zelman v. Simmons-Harris*, 120 S. Ct. 443 (1999). Thereafter, this Court entered an order on November 15, 1999, concluding that the Supreme Court's decision granting the State's motion for a stay rendered moot Defendants' pending motions for a stay in this Court. The case proceeded in the district court on an expedited basis.

On October 15, 1999, all parties stipulated that the handbooks, mission statements and brochures of the schools participating in the Cleveland scholarship program are "authentic, speak for themselves, have been made available to the parents of the scholarship students and are not false or

misleading. Some of these documents however may not accurately reflect admission standards that had to be revised." Plaintiffs and Defendants both filed motions for summary judgment on November 1, 1999.

On November 29, 1999, the district court denied Intervenor Taylor's motion to have the following question certified to the Ohio Supreme Court: "Does Ohio law give preclusive effect to the resolution of the Establishment Clause claiming *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999)?"

The district court granted Plaintiffs' motion for summary judgment on December 20, 1999, finding that the voucher program violated the Establishment Clause; enjoined Defendants from administering the program; and denied Defendants' motion for summary judgment. *See Simmons-Harris v. Zelman*, 72 F. Supp. 2d 834, 836 (N.D. Ohio 1999). The court stayed its summary judgment order with Plaintiffs' consent pending review by this Court. Defendants and Intervenors appealed to this Court on January 12, 2000.

II.

We recognize the significance that this issue holds for many members of our society. The issue of school vouchers has been the subject of intense political and public commentary, discussion, and attention in recent years, and we would be remiss if we failed to acknowledge the seriousness of the concerns this case has raised. We do not, however, have the luxury of responding to advents in educational policy with academic discourse on practical

solutions to the problem of failing schools; nor may we entertain a discussion on what might be legally acceptable in a hypothetical school district. We may only apply the controlling law to the case and statute before us.

The courts do not make educational policy; we do not sit in omnipotent judgment as to the efficacy of one scheme or program versus another. The design or specifics of a program intended to remedy the problem of failing schools and to rectify educational inequality must be reserved to the states and the school boards within them, with one caveat: the proposed program may not run afoul of the freedoms guaranteed to all citizens in the Constitution. In other words, the determinations of states and school boards cannot infringe upon the necessary separation between church and state. We therefore consider the program presented before us under the controlling precedents of the United States Supreme Court and this Court to determine whether such infringement has occurred.

This Court reviews the district court's grant of summary judgment *de novo*. *See Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 376 (6th Cir. 1999). Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). There is no genuine issue of material fact when the "record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Appendix A

The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion . . . ." U.S. Const., amend. I. In *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), the Supreme Court set forth the following test to determine whether a statute passes muster under the Establishment Clause: 1) the statute must have a secular legislative purpose; 2) the principal or primary effect of the statute must be one that neither advances nor inhibits religion; and 3) the statute must not foster excessive entanglement with religion. If a statute fails any portion of this test, it violates the Establishment Clause. *Id.* The Supreme Court has applied the *Lemon* test regularly in the context of schools and education. *See, e.g., Kiryas Joel Sch. Dist. v. Gromet*, 512 U.S. 687 (1994) (drawing a separate school district for one religion violates the Establishment Clause); *Stone v. Graham*, 449 U.S. 39 (1989) (posting Ten Commandments on walls of public school violates Establishment Clause); *Bowen v. Kendrick*, 487 U.S. 589 (1988) (holding that Establishment Clause does not prevent religious organizations from participating in federally funded program); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (overturning statute which required the teaching of Creationism in public schools); *Aguilar v. Felton*, 473 U.S. 402 (1985) (paying public school employees to teach in parochial school violates the Establishment Clause), *overruled by Agostini v. Felton*, 521 U.S. 203 (1997); *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373 (1985) (finding a shared time program to be a violation of Establishment Clause), *overruled by Agostini v. Felton*, 521 U.S. 203 (1997); *Mueller v. Allen*, 463 U.S. 388 (1983) (permitting taxpayers to deduct from state income tax expenses incurred in sending children to parochial schools does not violate Establishment Clause); *Roemer v. Bd. of*

Pub. Works, 426 U.S. 736 (1976) (finding no violation of Establishment Clause in providing government aid to both public and private universities).

The Supreme Court and individual justices have introduced variations on the *Lemon* test in other contexts. *See Lee v. Weisman*, 505 U.S. 577, 592-98 (1992) (using coercion test developed by Justice Kennedy to hold that school could not provide for nonsectarian prayer to be given at graduation by school-selected clergyman); *County of Allegheny v. ACLU*, 492 U.S. 573, 594-602, 655-79 (1989) (using two-part test developed by Justice O'Connor — Establishment Clause is violated when 1) government is excessively entangled with religion, or 2) government endorses or disapproves of religion — as part of the *Lemon* test regarding government displays of objects with religious connotations; introducing Justice Kennedy's two-part coercion test — 1) government may not coerce participation in religion, and 2) government may not directly benefit religion — in his concurrence); *Wallace v. Jaffree*, 472 U.S. 38, 56 & n.42 (1985) (using Justice O'Connor's two-part test as part of the *Lemon* analysis and finding it appropriate to determine whether the government's purpose is to endorse or disapprove of religion); *Lynch v. Donnelly*, 465 U.S. 668, 687-94 (1984) (introducing Justice O'Connor's two-part test).

In *Agostini v. Felton*, 521 U.S. 203 (1997), the Court reaffirmed the importance of the *Lemon* test in Establishment Clause cases involving school aid, but noted that the entanglement prong could be considered as an aspect of the effects inquiry. *Agostini* found "three primary criteria" used

by the Court in evaluating whether government aid has the effect of advancing religion: whether the statute or programs in question "result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement." *Id.* at 234.

The Supreme Court has not overturned or rescinded the *Lemon* test even as it has used its framework to shape differing analyses. Although in *Agostini*, the Court articulated the primary criteria it would utilize to determine whether a government-aid program impermissibly advanced or endorsed religion, the Court has not necessarily limited itself to considering solely those criteria. Rather, it seems evident that the *Agostini* Court illustrated the *Lemon* test's flexibility and its evolution from the relatively rigid three-part test to an approach in which the varying components of a particular program or statute are analyzed with regard to their impact on, in the context of schools, the relevant students or communities. We therefore look to these components as aspects of the proper analysis under *Lemon*, but acknowledge that precedent does not limit itself to only these components should other components previously utilized by the Court be relevant, such as coercion of citizens, endorsement of religion, and direct benefit to religion. *See Mitchell v. Helms*, 120 S. Ct. 2530, 2556 (2000) (O'Connor, J., concurring) (finding that *Agostini* represents a general framework for approaching questions concerning neutral school-aid programs but recognizing that these type of cases depend on the particular facts of each case).

Of the cases which follow *Lemon*, we find the most persuasive, in that it is on point with the matter at hand, to

be *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973). In *Nyquist*, a New York State statute established, among other aid, a tuition grant program which provided for partial tuition reimbursement to low-income parents whose children attended private elementary or secondary schools. *See id.* at 761-70. The tuition reimbursement plan applied to parents of children who attended any private school, not solely sectarian schools, and was limited to 50% of tuition paid. *Id.* at 764. At the time the plan was challenged, nearly 20% of New York's school-age children attended nonpublic schools, and approximately 85% of these schools were sectarian. *Id.* at 768. The *Nyquist* Court noted that although "the characteristics of individual schools may vary widely from [the] profile," institutions which qualified for assistance under the statute were ones that included religious instruction and requirements as part of their academic curriculum. *See id.* at 767-68.

Following *Lemon*, the *Nyquist* Court found that the New York statute passed the first prong of the *Lemon* test — whether the statute had a secular purpose-because the tuition reimbursement program promoted pluralism and diversity among New York's public and private schools, and alleviated concern that the State's overburdened public schools would be harmed if a large number of children who had previously been attending private schools decided to return to the public schools. *See* 413 U.S. at 773. The Court did "not question the propriety, and fully secular content, of New York's interest in preserving a healthy and safe educational environment for all of its schoolchildren." *Id.*

Under the second prong of the *Lemon* test — that the statute neither advance nor inhibit religion-the New York

statute did not fare as well. The Court next found that the New York reimbursement program failed because "[i]n the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid." 413 U.S. at 780. The Court opined that the fact that program grants were delivered to parents rather than schools was "only one among many factors to be considered." *Id.* at 781. The Court rested its analysis on the premise that there had been " 'no endeavor to guarantee the separation between secular and religious educational functions and to ensure the State financial aid supports only the former.' " *Id.* at 783 (quoting *Lemon*, 403 U.S. at 613). "By reimbursing parents for a portion of their tuition bill, the State seeks to relieve their financial burdens sufficiently to assure that they continue to have the option to send their children to religion-oriented schools." *Id.* The Court noted that "while the other purposes for that aid — to perpetuate a pluralistic educational environment and to protect the fiscal integrity of overburdened public schools — are certainly unexceptionable, the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions." *Id.*

The *Nyquist* Court also recognized and discarded the state's arguments that it was of controlling significance that New York's program called for reimbursement of tuition already paid, thus ensuring that the parent is free to spend that tuition money in any manner he or she sees fit. 413 U.S. at 785-86. "[I]f the grants are offered as an incentive to parents to send their children to sectarian schools by making unrestricted cash payments to them, the Establishment Clause

is violated . . . . Whether the grant is labeled a reimbursement, a reward, or a subsidy, its substantive impact is still the same." *Id.* at 786. The Court also rejected the state's argument that the plan paid for only a portion of the tuition at a sectarian school, saying "if accepted, this argument would provide the foundation for massive, direct subsidization of sectarian elementary and secondary schools." *Id.* at 787.

The cases of *Everson v. Board of Education*, 330 U.S. 1 (1947), and *Board of Education v. Allen*, 392 U.S. 236 (1968) were carefully distinguished by the Court. In *Everson*, the Court upheld tax deductions for parents who expended bus fare for children who attended religious schools, reasoning that the bus fare program was analogous to the provision of services such as police and fire protection, sewage disposal, highways and sidewalks for parochial schools. *See* 330 U.S. at 17-18. The Court found that these services, common to all citizens, are "so separate and so indisputably marked off from the religious function, that they may fairly be viewed as reflections of a neutral posture toward religious institutions." *Id.* at 18. In *Allen*, the Court upheld a statute which allowed secular textbooks to be provided to children attending religious schools, finding that "the State claims no right to distribute religious literature," and noting that "we cannot assume that school authorities . . . are unable to distinguish between secular and religious books." 392 U.S. at 244-45. The *Nyquist* Court distinguished these two cases not only based on their neutral posture toward religion, but on the fact that in both of those cases, "the class of beneficiaries included all schoolchildren, those in public as well as those in private schools." 413 U.S. at 782 n.38, (citing *Tilton v. Richardson*, 403 U.S. 672 (1970) (making federal aid available to all institutions of higher learning)).

The Court noted that unlike in *Everson* and *Allen*, the tuition grants in *Nyquist* were not a neutral attempt to provide comparable benefits to all parents of schoolchildren whether enrolled in public or nonpublic schools, as the "grants to parents of private schoolchildren are given in addition to the right that they have to send their children to public schools totally at state expense." 413 U.S. at 782 n.38 (internal quotation marks omitted). The Court additionally determined that this argument of neutrality, if upheld, would be overly broad, providing "a basis for approving through tuition grants the complete subsidization of all religious schools on the ground that such action is necessary if the State is fully to equalize the position of parents who elect such schools — a result wholly at variance with the Establishment Clause." *Id.*

The Supreme Court has revisited many of the issues raised in *Nyquist*. In *Agostini v. Felton*, 521 U.S. 203, 237 (1997), the Court stated that "[w]e do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent." The Court continued to reaffirm "that if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, *the Court of Appeals should follow the case which directly controls*, leaving to this Court the prerogative of overruling its own decisions." *Id.* (emphasis added). The Supreme Court has refrained from overruling *Nyquist*, and has instead distinguished various cases on the basis of their facts; this Court has accordingly followed that approach. "A single factual difference consequently can serve to entangle or free a particular governmental practice from the reach of

the [Establishment] Clause's constitutional prohibition." *Coles*, 171 F.3d at 376. We therefore look to relevant case law to assist us by analogy in analyzing the factual discrepancies between this case and *Nyquist*.

In *Mueller v. Allen*, 463 U.S. 388 (1983), the Court found constitutional a Minnesota statute which allowed state taxpayers to deduct on their state income tax certain tuition, transportation and educational expenses of their children attending elementary or secondary schools. Following the *Lemon* test, the Court agreed that the statute had the secular purpose of defraying the cost of education for all parents, regardless of the type of school their children attend. *Id.* at 395. Analyzing the effect of the statute, the Court held that the program did not have a primary effect of advancing religion because the tax deduction was a traditional area for state legislatures to codify policies which "achieve an equitable distribution of the tax burden," and because the deduction was available for educational expenses incurred by all parents, whether their children attended public schools, nonsectarian private schools, or church-affiliated schools. *Id.* at 396-98.

The Court found it compelling that the deduction was available for all parents with school age children, stating that this aspect was "vitally different from the scheme struck down in *Nyquist*. There, public assistance amounting to tuition grants was provided only to parents of children in nonpublic schools." *Id.* at 398. The Court analogized the tax deduction scheme as similar to the G.I. Bill, or other forms of "public assistance made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of

the institution benefitted." *Id.* The Court found it significant that under the Minnesota plan, governmental aid was only channeled through the parents, rather than directly paid to the parochial institutions, and noted that it would not base the constitutionality of a statute on the consideration of yearly statistical evidence concerning which nonsectarian schools — religious or otherwise — benefitted from the tax deduction. *Id.* at 401. The Court stated that the Establishment Clause is not a bar to "the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case." *Id.* at 400.

In *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), the Supreme Court found constitutional a Washington State program which provided vocational rehabilitation assistance grants to a blind individual who attended a Christian college in the hope of becoming a pastor. The Court found the statute's purpose "unmistakably secular," *id.* at 486, and found that unlike *Nyquist*, "any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." *Id.* at 488. The fact that the vocational assistance was paid directly to the student, who could expend the educational funds on "wholly secular education," persuaded the Court to find that the program did not create an incentive to apply the aid to religious education. *Id.* "Aid recipients' choices are made among a huge variety of possible careers, of which only a small handful are sectarian. . . . Nothing in the record indicates that . . . any significant

portion of the aid expended under the Washington program as a whole will end up flowing to religious education." *Id.* The Court also found that "the mere circumstance that petitioner has chosen to use neutrally available state aid to help pay for his religious education [does not] confer any message of state endorsement of religion." *Id.* at 489.

In *Agostini v. Felton*, the Court held that the Establishment Clause did not bar a New York program which sent public school teachers into parochial schools to provide remedial education to disadvantaged children. Recognizing that there had been significant changes in Establishment Clause jurisprudence, the Court found that it could no longer presume "that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion." 521 U.S. at 223. The Court noted that those direct aid programs where grants are "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted [are valid departures from the general rule] that all government aid that directly aids the educational function of religious schools is invalid." *Id.* at 225. Relying on an earlier case which had found it permissible to place a public school sign language interpreter into a private parochial school under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, the Court determined that these instances involve situations where money ultimately goes to religious schools "only as a result of the genuinely independent and private choices of individuals." *Id.* at 225-26 (citing *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993)). The Court noted as a central part of its analysis that the services

provided by public school employees were remedial, stating that the "services do not, therefore, reliev[e] sectarian schools of costs they otherwise would have borne in educating their students." *Id.* at 228. The Court concluded that the New York program services "are available to all children who meet the Act's eligibility requirements, no matter what their religious beliefs or where they go to school." *Id.* at 232.

The Supreme Court revisited this issue this past term. By a plurality, the Court upheld a program to loan educational materials and equipment to private religious schools which channeled federal funds through state agencies. *See Mitchell v. Helms*, 120 S. Ct. 2530 (2000). Writing for four justices, Justice Thomas concluded that the critical question in cases of government aid to religious schools is whether the government aid is neutral: whether it results from the genuinely independent and private choices of individual parents. *See id.* at 2541-44. Justice Thomas noted that the nexus between neutrality and private choice was the prominent, even the chief factor, in upholding government aid in *Agostini*, *Zobrest*, *Witters*, and *Mueller*, and found that there is a close relationship between private choice and the question of whether a program creates a financial incentive to undertake religious schooling. *See id.* at 2543.

The opinion goes on to state that "[i]f aid to schools, even direct aid, is neutrally available and, before reaching or benefitting any religious school, first passes through the hands (literally or figuratively) of numerous private citizens who are free to direct the aid elsewhere, the government has not provided any support of religion." 120 S. Ct. at 2544 (internal citations omitted). The opinion recognizes that there

exist "special Establishment Clause dangers when money is given to religious schools or entities directly rather than, as in *Witters* and *Mueller*, indirectly." *Id.* at 2546 (internal citations omitted). In a footnote, Justice Thomas hypothesized "that the principles of neutrality and private choice would be adequate to address those special risks." *Id.* at 2547 n.8. He continued to find that at least in regards to *Nyquist*, the prohibition against direct payments was linked to "serious concerns about whether the payments were truly neutral." *Id.*

Although Justice O'Connor concurred in the judgment, she wrote separately in *Mitchell* based upon her belief that "the plurality announces a rule of unprecedented breadth for the evaluation of Establishment Clause challenges to government school-aid programs." 120 S. Ct. at 2556. Justice O'Connor's concurring opinion shows disagreement not only with the "expansive scope of the plurality's rule[,]" but with two specific aspects of its analysis. *Id.* First, she found the plurality's "treatment of neutrality comes close to assigning that factor singular importance in the future adjudication of Establishment Clause challenges to government school-aid programs." *Id.* Second, she found "the plurality's approval of actual diversion of government aid to religious indoctrination is in tension with our precedents and . . . unnecessary to decide the instant case." *Id.*

While agreeing with Justice Thomas that "neutrality is an important reason for upholding government-aid programs against Establishment Clause challenges," Justice O'Connor opined that "neutrality is not alone sufficient to qualify the aid as constitutional." 120 S. Ct. at 2557-58. She criticized Justice Thomas's opinion for relying on logic which would support direct government aid to religious organizations

based on the number of persons belonging to each organization. "[T]he plurality opinion foreshadows the approval of direct monetary subsidies to religious organizations, even when they use the money to advance their religious objectives." *Id.* at 2560. Justice O'Connor rejected an outright ban on any diversion of government funds to sectarian uses, but would enact a rule which requires plaintiffs to prove that the aid in question is, or has been, used for religious purposes, and found that "presumptions of religious indoctrination are normally inappropriate when evaluating neutral school-aid programs under the Establishment Clause." *Id.* at 2567.

Justice O'Connor concluded that because the school-aid program in *Agostini* was similar to that at issue in *Mitchell*, the *Agostini* criteria should control the outcome of the case; however, she noted that the "school-aid cases often pose difficult questions at the intersection of the neutrality and no-aid principles and therefore defy simple categorization under either rule." 120 S. Ct. at 2560.

In regard to *Mitchell* and its sharply divided plurality, we note that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.' " *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)). Accordingly, we find that the opinion of Justice O'Connor is the narrower of the plurality, as it utilizes the standard of *Agostini* based on a factual similarity rather than creating a new standard centered on neutrality, thereby making its mandates controlling.

Appendix A

III.

We now apply the framework established by precedent to the case before us, recognizing the predominating theme in this area of law to be the need for careful judicial attention to the factual detail in the challenged statutory scheme.

At the outset, we note that Defendants' argument concerning other options available to Cleveland parents such as the Community Schools is at best irrelevant. Analyzing the scholarship program choices as compared to choices or schools outside the program is asking this Court to examine the entire context of Ohio education. Such a question is not before this Court. The Defendants' argument would rewrite the law to require that the courts look to all possible alternatives to a challenged program, thus visiting issues of legislative choice and educational policy which no plaintiff has raised.

At oral argument, Defendants asserted repeatedly that the Community Schools program should be considered coterminous with the voucher program, arguing that the programs are merely separate sections in the statute. However, the statutory record does not support this argument, except for perhaps the literal meaning that the two programs do indeed occupy separate sections in the Ohio Code. The school voucher program is enacted as a complete program in the Ohio Revised Code. *See* Ohio Rev. Code §§ 3313.974-3313.983. The program is enacted as a part of the chapter on Boards of Education. *See* Ohio Rev. Code § 3313.01 *et seq.* Furthermore, the school voucher program, and only the school voucher program, was challenged by Plaintiffs in this lawsuit. In contrast, the Community Schools program is codified in its own chapter. *See* Ohio Rev. Code §§ 3314.01

et seq. It is similarly a complete program within the Code: the statutory provisions govern all aspects of the program without reference to the voucher program. We may not view these two programs as inextricably interdependent when the plain language of the statutory scheme demonstrates the opposite. It is simply not the proper role of the courts to change statutory construction by judicial fiat. *See Brogan v. United States*, 522 U.S. 398, 408 (1998); *Nat'l Life and Accident Ins. Co. v. United States*, 524 F.2d 559, 560 (6th Cir. 1975) ("The Courts . . . do not have the power to repeal or amend the enactments of the legislature even though they may disagree with the result; rather it is their function to give the natural and plain meaning effect to statutes . . . ."). Should we consider the Community Schools program in our analysis of the constitutionality of the school voucher program, we would open the door to a wide-reaching analysis which would permit us to consider any and all scholarship programs available to children who qualify for the school voucher program: we would be considering and comparing every available option for Cleveland children. Such an analysis would expand our jurisdiction far beyond the case at hand; we are presented only with the question of whether the school voucher program violates the Establishment Clause, and we must limit ourselves to that issue, regardless of the temptations Defendants' arguments present.

We find that *Nyquist* governs our result. Factually, the program at hand is a tuition grant program for low-income parents whose children attend private school parallel to the tuition reimbursement program found impermissible in *Nyquist*. Under both the New York statute in *Nyquist*, as well as the Ohio Statute at issue, parents receive government

funds, either in direct payment for private school tuition or as a reimbursement for the same, and in both cases, the great majority of schools benefitted by these tuition dollars are sectarian. The *Nyquist* Court itself found there to be no distinction between "a reimbursement, a reward, or a subsidy, [as in all three,] the substantive impact is still the same." 413 U.S. at 786. As in *Nyquist*, the Ohio program contains no "effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes." *Id.* at 780. Here, there is clearly "no endeavor to guarantee the separation between secular and religious functions and to ensure that State financial aid supports only the former." *Id.* at 783. In both *Nyquist* and this case, there are no restrictions on the religious schools as to their use of the tuition funds — the funds may be used for religious instruction or materials as easily as for erasers and playground equipment.

Despite the language of the statute, there is no evidence that the tuition vouchers serve as a neutral form of state assistance which would excuse the direct funding of religious institutions by the state, despite the statute's language. Admittedly, the voucher program does not restrict entry into the program to religious or sectarian schools, but facial neutrality alone does not bring state action into compliance with the First Amendment. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). The school voucher program is not neutral in that it discourages the participation by schools not funded by religious institutions, and the Cleveland program limits the schools to which a parent can apply the voucher funds to those within the program. Practically speaking, the tuition restrictions

mandated by the statute limit the ability of nonsectarian schools to participate in the program, as religious schools often have lower overhead costs, supplemental income from private donations, and consequently lower tuition needs. *See* Martha Minow, *Reforming School Reform*, 68 Fordham L. Rev. 257, 262 (1999) (finding that voucher funding levels typically "approximate[ ] the tuition level set by parochial schools [which] reflects subsidies from other sources"). In fact, Defendants admit that there is incentive for private nonsectarian schools to participate in the community schools program rather than in the school voucher program. *See* Brief of State at 10. The evidence illustrates this point in that 82% of participating schools are sectarian, just as in *Nyquist* where 85% of the participating schools were sectarian. Beyond that, we note that the number of available places for students in sectarian schools is higher than 82%, as many of the sectarian schools are larger and provide a greater number of places for children in the voucher program. Moreover, close to 96% of the students enrolled in the program for the 1999-2000 school year attended sectarian institutions.

The alleged choice afforded both public and private school participants in this program is illusory in that the program's design does not result in the participation of the adjacent public schools from outside the Cleveland school district. Per pupil expenditures in the public schools are backed by $7,097 in public funding. *See* Brief of Senel Taylor Intervenors at 17. At a maximum of $2,250, there is a financial disincentive for public schools outside the district to take on students via the school voucher program. Since its inception, no public schools from outside Cleveland have registered in the school voucher program, and there are no

spaces available for children who wish to attend a suburban public school in place of a private school under the program. Therefore, the program clearly has the impermissible effect of promoting sectarian schools.

This is not the type of case which would fall into the exception to the *Nyquist* rules. Here, state assistance is only available to those students who attend private schools-the aid is clearly dependent on whether parents choose public or private schools. That the majority of places available in the program are for students attending sectarian schools is not unpersuasive. This program provides incentives for parents to choose schools other than mainstream public ones, but that choice does not extend to schools outside of the program. Students may not choose to attend community or magnet schools using a voucher, they may not apply a voucher to tuition at a private school outside the Cleveland School District, and they may not receive a voucher for a private school within the Cleveland School District which has not registered as part of the program. Rather, the program provides financial assistance for those parents who wish to place their children in the particular private schools, mostly religious, which take part in the program. We find such a scheme directly akin to *Nyquist's* offensive aid to only private school students, and not an instance where "the class of beneficiaries included all schoolchildren, those in public as well as those in private schools." 413 U.S. at 782 n.38. The effect of this program, like *Nyquist* and unlike *Mueller* and subsequent cases, is one where "public assistance amounting to tuition grants was provided only to parents of children in nonpublic schools." *Mueller*, 463 U.S. at 398.

Appendix A

Contrary to the tax deduction generally available in *Mueller*, the Ohio voucher program is available to curtail only those expenses which students attending certain private schools accrue. *See* 463 U.S. at 398 (distinguishing the *Mueller* program from that in *Nyquist* because in *Nyquist*, "tuition grants [were] provided only to parents of children in nonpublic schools"). The idea of parental choice as a determining factor which breaks a government-church nexus is inappropriate in the context of government limitation of the available choices to overwhelmingly sectarian private schools which can afford the tuition restrictions placed upon them and which have registered with the program. The absence of any meaningful public school choice from the decision matrix yields a limited and restricted palette for parents which is solely caused by state legislative structuring.

In contradistinction to *Witters*, a student under the Ohio statute cannot apply state aid to any school he or she chooses, including public schools, since under the Ohio program, no public schools have enrolled, nor are likely to enroll. Similarly, *Agostini* is inapposite because the services made available to students at parochial schools through the placement of public school teachers to teach secular subjects were available to all qualifying students without regard to the nature of the institution they attended. 521 U.S. at 232 (finding that under the New York program at issue in *Agostini*, and unlike the *Nyquist* program, services "are available to all children who meet the Act's eligibility requirements no matter . . . where they go to school). While the program upheld in *Mitchell* provided for the loan of instructional equipment by state agencies to both public and private schools, in this case aid predominantly flows directly

to the coffers of religious institutions. Unlike *Mitchell*, under the Ohio statute, there are not "numerous private citizens who are free to direct the aid elsewhere" as the majority of the choices available to parents and students are religious institutions. 120 S. Ct. at 2533 (Thomas, J. plurality). The voucher program at issue constitutes the type of "direct monetary subsidies to religious institutions," that Justice O'Connor found impermissible in *Mitchell*. *Id.* at 2559-60 (O'Connor, J. concurring). This program is dissimilar to that upheld in both *Agostini* and *Mitchell*, as here aid goes only to students enrolled in private schools, thereby fostering the type of government entanglement prohibited under the Establishment Clause.

To approve this program would approve the actual diversion of government aid to religious institutions in endorsement of religious education, something "in tension" with the precedents of the Supreme Court. *Mitchell*, 120 S. Ct. at 2556. We find that when, as here, the government has established a program which does not permit private citizens to direct government aid freely as is their private choice, but which restricts their choice to a panoply of religious institutions and spaces with only a few alternative possibilities, then the Establishment Clause is violated. This scheme involves the grant of state aid directly and predominantly to the coffers of the private, religious schools, and it is unquestioned that these institutions incorporate religious concepts, motives, and themes into all facets of their educational planning. There is no neutral aid when that aid principally flows to religious institutions; nor is there truly "private choice" when the available choices resulting from the program design are predominantly religious.

We conclude that unlike *Mitchell*, *Agostini*, *Witters* and *Mueller*, the Ohio scholarship program is designed in a manner calculated to attract religious institutions and chooses the beneficiaries of aid by non-neutral criteria. The effect of the voucher program is in direct contravention to these Supreme Court cases which mandate that the state aid be neutrally available to all students who qualify, that the parents receiving the state aid have the option of applying the funds to secular organizations or causes as well as to religious institutions, and that the state aid does not provide an incentive to choose a religious institution over a secular institution. Accordingly, we hold that no genuine issue of material fact remains for trial that the voucher program has the primary effect of advancing religion, and that it constitutes an endorsement of religion and sectarian education in violation of the Establishment Clause. We therefore affirm the district court's order granting summary judgment to Plaintiffs.

IV.

Intervenor Taylor asserts that the district court erred by holding that the Ohio Supreme Court's opinion in *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999), did not estop Plaintiffs' claim, and by refusing to certify the question of estoppel to the Ohio Supreme Court. This Court reviews the issue of collateral estoppel as part of the summary judgment determination *de novo*. This Court reviews the district court's denial of certification for an abuse of discretion. *See Transamerica Ins. Co. v. Duro Bag Mfg. Co.*, 50 F.3d 370, 372 (6th Cir. 1995).

Under both federal and state law, an "issue must have been necessary to support the judgment . . . in the prior proceeding" in order to find collateral estoppel. *Knox County Educ. Ass'n v. Knox County Bd. of Educ.*, 158 F.3d 361, 376-77 (6th Cir. 1998); *accord MetroHealth Med. Ctr. v. Hoffmann-LaRoche, Inc.*, 685 N.E.2d 529, 533 (Ohio 1997) ("Issue preclusion precludes the relitigation of an issue that has been actually and necessarily litigated and determined in a prior action."); *cf. Ameigh v. Baycliffs Corp.*, 690 N.E.2d 872, 875 (Ohio 1998) ("Where the judgment of a court is not dispositive on issues which a party later seeks to litigate, *res judicata* is not applicable . . . even if the prior court decision has discussed the issues that are the subject of the current litigation."). A determination is not essential to the judgment if the judgment could be supported by an adequate and independent state ground. *See Lambrix v. Singletary*, 520 U.S. 518 522-24 (1997). In *Goff*, the Ohio Supreme Court held that the 1995 school voucher program was enacted in violation of the one-subject rule of the Ohio Constitution, and on that basis, ordered the program in its entirety "stricken" from the Ohio statute books. 711 N.E.2d at 203. That ruling entitled the plaintiffs to the relief they requested, and therefore, any discussion of other grounds for striking or upholding the statute could be neither necessary nor essential to the holding. The Ohio Court determined that the entire program could not stand; therefore, any analysis as to the constitutionality of particular portions of the program was by definition advisory or dicta, and cannot be relied upon to bar further litigation. Because Plaintiffs would not be able to obtain Supreme Court review of the Ohio Supreme Court's determination as to the Establishment Clause, such determinations cannot constitute collateral estoppel. *See Cal.*

v. Rooney, 483 U.S. 307, 311 (1987) (declining to review a Fourth Amendment ruling adverse to the state of California where that ruling was unnecessary to a judgment in favor of the state).

Similarly, the district court did not err in refusing to certify the question to the Ohio Supreme Court. The governing law as to whether a party is estopped from relitigating an issue not essential to the court's determination is clear and uncontroverted; we therefore find no abuse of discretion in the district court's determination.

V.

Before concluding, we must pause to briefly address the dissent, not for the purpose of dignifying its hyperbole, but to quash any putatively substantive argument which may have found its way through the gratuitous insults. The dissent first makes the bald-faced assertion that the majority has struck down the voucher program as unconstitutional without any "meaningful" independent analysis, and that the majority simply concludes that the program is "foreordained" to be found unconstitutional under *Nyquist*. According to the dissent, the New York statute in *Nyquist* is "totally different" from the Ohio statute before us today, thus making it impossible to "take seriously" the majority's conclusion that *Nyquist* is controlling. However, even a cursory reading of the majority opinion clearly indicates that it is the dissent and its rhetoric which should not be taken seriously. As carefully set forth in Part III of this opinion, the Ohio statute at issue has the same effect as that of the New York statute held unconstitutional under the Establishment Clause in

Nyquist. Both statutes have the impermissible effect of benefitting only students in particular private, and mostly religious, schools, irrespective of the illusory choice provided on the face of the Ohio statute. The fact that the dissent may not agree with the analysis set forth in the opinion to illustrate this point does not *ipso facto* render the analysis "meaningless."

Second, in a similar vein, the dissent claims that the majority reaches its conclusion that the voucher program is unconstitutional under the Establishment Clause without conducting any "meaningful" analysis into the Supreme Court's several cases on this issue since *Nyquist* was handed down. However, in Part II of this opinion, the majority painstakingly sets forth First Amendment Establishment Clause jurisprudence and its evolution since *Nyquist*, while carefully applying that law to the statute at hand in the following section. Again, it is obvious that the dissent's bald-faced assertion that this analysis is not "meaningful" is apparently born out of nothing more than its disagreement with the outcome of this case, rather than with an objective observation. It is the majority which employs the evolving jurisprudential standards in reaching its outcome, while the dissent employs a rigid antiquated standard to reach its result driven outcome in contravention of the Supreme Court's latest pronouncements.[1] *See, e.g., Agostini*, 521 U.S. at 222-26.

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1. Judge Ryan inappropriately calls for an *en banc* review of the matter in his dissent. There are rules and procedures governing a call for *en banc* review once a case has been decided, whether the call is made by a party or *sua sponte* by an active judge of this Court or member of the original panel, and it is the process contemplated by these rules and procedures which should be used

(Cont'd)

VI.

We recognize the importance of this case and the precedential value it espouses. Equally as important, we are aware of the critical nature of questions of educational policy, and the need to establish successful schools and academic programs for children. We find, however, that even more important is the need to uphold the Constitution of the United States and, in this case, to override the State of Ohio's statutory scheme where it constitutes an impermissible infringement under the Establishment Clause of the First Amendment. We therefore **AFFIRM** the district court's order finding the school voucher program unconstitutional, as well as the court's determination that Plaintiffs are not collaterally estopped.

(Cont'd)
to invoke *en banc* review after the Court's opinion has been issued. *See Craft v. CIR*, Nos. 99-1734, 99-1737, 2000 WL 1726906, at n.18 (6th Cir. Nov. 22, 2000) (criticizing the concurring opinion's exhortation for *en banc* review of the matter, while noting that Fed. R. App. P. 35(b) and 6 Cir. I.O.P. 35(c) set forth the appropriate procedures to follow when calling for such review). The unfortunate practice of arguing for *en banc* review of a case in a panel member's separate opinion — instead of simply permitting the Court's regular operating procedures for seeking such review to be followed subsequent to the issuance of the majority opinion — is one which should not be perpetuated.

Appendix A

CONCURRING IN PART, DISSENTING IN PART

RYAN, Circuit Judge, concurring in part and dissenting in part. My colleagues' resolution of the question presented by the plaintiffs' collateral estoppel claim is eminently correct and so I join part IV of the court's opinion. However, because I believe Ohio's voucher program to be constitutional under the First Amendment and the Supreme Court's Establishment Clause cases interpreting the amendment, I must respectfully dissent from the majority's treatment of the voucher program's constitutionality.

My brothers have struck down as unconstitutional Ohio's effort to establish a school-choice voucher program whose primary purpose is to enable mostly minority poverty-level school children, in Cleveland, Ohio, to escape the devastating consequences of attending Cleveland's demonstrably failed public schools. My colleagues have done so not on the basis of any independent constitutional analysis of the Ohio Pilot Project Scholarship Program, as the voucher program is formally known, but because they claim the invalidity of the statute is a conclusion foreordained by the United States Supreme Court's decision in *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973). I disagree. The New York statute interpreted in *Nyquist* and the Ohio statute before us are totally different in all of their essential respects, both in their purposes and their provisions for carrying out their respective purposes. It is impossible to take seriously the majority's claim that *Nyquist* governs our result and, *for that reason*, requires that the Ohio voucher program must be struck down.

Moreover, the majority's refusal to conduct any meaningful analysis of the Supreme Court's several Establishment Clause decisions handed down in the 27 years since *Nyquist* was decided, its insistence that the plainly distinguishable *Nyquist* case is directly on point, and the factually unsupported antireligious-schools arguments in the opinion strongly suggest that the majority has simply signed onto the familiar anti-voucher mantra that voucher programs are no more than a scheme to funnel public funds into religious schools.

I.

According to the majority, this court need not conduct any independent analysis whether Ohio's voucher program violates the Establishment Clause because *Nyquist* is "on point with the matter at hand." Slip op. at 13. In my judgment, the majority is mistaken as a matter of *fact* (the two statutes are totally different) and as a matter of *law* (the relevant Establishment Clause jurisprudence has changed since *Nyquist*). As to the latter, a reading of the Supreme Court's Establishment Clause cases decided since 1973 makes it unmistakably clear that the voucher program passes constitutional muster. I do not claim that the *Nyquist* decision has been overruled, although some of the reasoning in the *Nyquist* opinion has been "undermined," as the Ohio Supreme Court put it in *Simmons-Harris v. Goff*, 711 N.E.2d 203, 208 (Ohio 1999); *Nyquist* is simply inapposite to the appeal before us.

The New York statutory provisions struck down in *Nyquist* and the Ohio voucher program are essentially different laws; they are plainly distinguishable both in their

declared purposes and in the manner of their application. For that reason alone, the reasoning and the holding of the *Nyquist* decision cannot govern our result.

A.

I begin with a comparison of the New York statutory provisions construed in *Nyquist* and the Ohio statute before us; a comparison that shows very clearly that the two laws are essentially different. I then examine the Supreme Court Establishment Clause cases decided since *Nyquist*, which clearly indicate that the Ohio voucher program is not unconstitutional.

1.

In *Nyquist*, the Supreme Court was required to decide whether a New York statute containing provisions for both direct and indirect financial assistance to New York's private schools violated the Establishment Clause. The statute provided for three forms of assistance: (1) direct grants for building maintenance and repairs for private school buildings; (2) tuition reimbursement grants for some low-income parents of children already attending the private schools; and (3) a form of tax relief for parents who failed to qualify for tuition reimbursement under the statute. *See Nyquist*, 413 U.S. at 762-65.

The New York legislature enacted the statute for the *sole* purpose of directly benefitting New York state's 2,038 financially pressed *private* schools, wherein some 700,000-800,000 students — almost 20% of the state's entire

elementary and secondary school population — were being educated. *See id.* at 768. The legislative "findings" in the New York statute declared: (1) it was in the state's interest to provide funding for "maintenance and repair" of the state's private schools in order to protect the health and safety of those attending the schools; (2) the state had an interest in promoting "alternative educational systems"; and (3) a "precipitous decline" in the number of children attending private schools would perpetuate an already existing fiscal crisis in public schools. *Id.* at 763-65.

The *Nyquist* Court held that the New York law offended the Establishment Clause because "the effect of the aid [was] unmistakably to provide desired financial support for nonpublic, sectarian institutions." *Id.* at 783. Furthermore, the *Nyquist* Court concluded that "[i]n the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid." *Id.* at 780.

The Ohio voucher program, which is adequately described in the majority opinion, could not be more unlike the New York statute both in its purpose and in the manner of its application. The essential differences between the New York and Ohio statutes may be summarized as follows:

First, the purpose of the New York statute was to provide financial help to New York's financially troubled *private schools* because their closing would force New York's public schools to absorb the private school students, resulting in massive increased costs and the related burdens of absorbing as many as three quarters of a million new students.

The purpose of the Ohio statute, on the other hand, is to provide financial help to poverty-level students attending the *public schools* in Cleveland in order to enable them, if they wish, to attend nonreligious private schools, religious private schools, public schools in neighboring districts that wish to participate in the voucher program, or to obtain special tutoring while remaining in the Cleveland public schools.

Second, the New York program involved *direct* financial grants to New York's *private* schools, religious and nonreligious, primarily for maintenance and repair. Although the tuition reimbursement and tax relief sections of the statute appeared to benefit the parents of private school children, the *Nyquist* Court stated that the "tuition reimbursement program also fails the 'effect' test, for much the same reasons that govern its maintenance and repair grants." *Id.*

Under the Ohio voucher program, on the other hand, there is no provision for any financial grants in any form to any private schools. A voucher recipient receives a scholarship check, and the funds therefrom reach a private religious school only after a child's parents have considered a variety of options available to them and have chosen the religious private school as the best option for their child.

Third, the New York statute permitted government aid to schools that discriminated against children on the basis of religion and, in fact, several qualifying schools imposed religious restrictions on admissions. *See id.* at 767-68.

The Ohio voucher program, on the other hand, contains a provision explicitly forbidding participating schools from

discriminating against prospective students on the basis of religion. *See* Ohio Rev. Code § 3313.976(A)(4).

It is clear that the New York statute struck down in *Nyquist* and the Ohio statute before us are dissimilar laws both in their purposes and the methodologies for carrying out their purposes. As the majority acknowledges, "[a] single factual difference consequently can serve to entangle or free a particular governmental practice from the reach of the [Establishment] Clause's constitutional prohibition." Slip op. at __ (internal quotation marks and citation omitted). A case construing a statute so manifestly different than the one before us could hardly, as a *factual* matter, be a binding precedent on this court.

2.

The substantial differences in the purpose and application of the two statutes is not the only reason *Nyquist* does not govern our result. The additional reason is that the rule of law upon which *Nyquist* was decided has changed. First, the *Nyquist* era categorical prohibition against direct grants to aid religious schools is no longer the law; and second, the criteria for determining when a statute has the forbidden "primary effect" of advancing religion have been modified.

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Supreme Court fashioned the following test for assessing whether a statute violates the Establishment Clause:

> First, the statute must have a secular legislative purpose; second, its principal or *primary effect*

> must be one that neither *advances* nor inhibits *religion* : . . ; finally, the statute must not foster an excessive government entanglement with religion.

Id. at 612-13 (emphasis added) (internal quotation marks and citation omitted).

The *Nyquist* Court ruled that the New York statute violated the *Lemon* test because it had the "impermissible effect of advancing religion." *Nyquist*, 413 U.S. at 794. It did so, the Court said, by providing direct financial assistance to religious schools without any restrictions as to the schools' use of the funds, therefore "advanc[ing] the religious mission of sectarian schools." *Id.* at 779-80. But three years ago in *Agostini v. Felton*, 521 U.S. 203 (1997), the Supreme Court declared unmistakably that "we have departed from the rule . . . that all government aid that directly assists the educational function of religious schools is invalid." *Id.* at 225. The *Agostini* Court then proceeded to redefine and narrow the criteria for determining when government aid that finds its way to a religious school has the primary effect of advancing religion.

Again, I do not question for a moment the correctness of the Supreme Court's decision in *Nyquist*. I accept it both analytically and precedentially as a faithful 1973 application of the "primary effect" test of *Lemon*. However, *Nyquist* was not analyzed and decided under what the *Agostini* Court called its "changed . . . understanding of the criteria used to assess whether aid to religion has an impermissible effect." *Id.* at 223. Since this appeal is also an "impermissible effect" case, our decision cannot be controlled by *Nyquist*.

Appendix A

B.

What then is the Supreme Court's "changed . . . understanding" of the proper test for determining whether a law has the primary effect of advancing religion?

In *Mueller v. Allen*, 463 U.S. 388 (1983), the Court held that a Minnesota statute authorizing a tax deduction for certain educational expenses for parents of students attending either public or private schools, religious or nonreligious, did not violate the "impermissible effect" prong of the *Lemon* test. The Court focused on the fact that the deduction was given directly to the parents, without regard to the type of school, religious or nonreligious, to which the parents might choose to send their children, as a strong indicator of the statute's "neutrality." *See id.* at 397-400. Any money received at a religious school, the Court said, was "ultimately controlled by the private choices of individual parents." *Id.* at 400.

This principle — that whether public funds find their way to a religious school is of no constitutional consequence if they get there as a result of genuinely private choice — was reasserted in *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986). There, a Washington state program survived an Establishment Clause challenge even though it provided vocational rehabilitation assistance for a blind individual to attend a Christian college in order to study to be a Christian pastor. Funds under the program were dispersed directly to the eligible applicants who made the choice of where to expend the educational funds; therefore, "[a]ny aid . . . that ultimately flow[ed] to

religious institutions [did] so only as a result of the genuinely independent and private choices of aid recipients." *Id.* at 488.

In *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), the Court upheld the constitutionality of a program providing a sign-language interpreter for a deaf student in a Catholic high school. Relying upon *Witters* and *Mueller*, the *Zobrest* Court concluded that the statute gave parents the choice of where to send their eligible children to school and "distributes benefits neutrally . . . without regard to the 'sectarian-nonsectarian, or public-nonpublic nature' of the school." *Id.* at 10 (quoting *Witters*, 474 U.S. at 487).

This line of cases culminated in the *Agostini* decision in 1997, in which the Supreme Court declared that its understanding of the criteria for determining whether, in any specific program, government aid has the primary effect of advancing religion had "changed." Indeed, in *Agostini* the Supreme Court went so far as to modify the *Lemon* test it had relied upon in *Nyquist*. The *Agostini* Court began by recasting *Lemon*'s "entanglement" inquiry as a factor under the "impermissible effect" prong rather than as a separate and independent criterion. *See Agostini*, 521 U.S. at 232-34. It then identified three new sub-criteria to consider when evaluating whether a government-aid program violates *Lemon*'s "impermissible effect" prong. These are:

> (1) whether the aid results in governmental indoctrination;
>
> (2) whether the aid program defines its recipients by reference to religion; and

(3) whether the aid creates an excessive entanglement between government and religion.

See id. at 234.

Using this modified *Lemon* test, the *Agostini* Court found constitutional a federally mandated New York program that sent public school teachers into private parochial schools to provide remedial education to eligible children. Under the program, children meeting the eligibility requirements received the services, whether they attended a private or public school. *See id.* at 232. The *Agostini* Court concluded that programs in which money ultimately flows to a private, religious school based on the " 'genuinely independent and private choices of' individuals" do not violate the Establishment Clause. *Id.* at 226 (quoting *Witters*, 474 U.S. at 488).

Finally, in *Mitchell v. Helms*, 120 S. Ct. 2530 (2000), a plurality opinion written by Justice Thomas, the Court upheld the constitutionality of a federally mandated Louisiana program where educational materials were loaned to public and private schools, both religious and nonreligious. Justice Thomas emphasized that the statute did not have an "impermissible effect" because the "principles of neutrality and private choice, and their relationship to each other [that] were [also] prominent" in the Court's decisions in *Agostini*, *Zobrest*, *Witters*, and *Mueller* were present. *Id.* at 2542.

II.

It is against this background of changed Supreme Court Establishment Clause jurisprudence that we must test the constitutionality of the Ohio voucher program.

Appendix A

The Ohio statute is the product of a 1994 order issued by the United States District Court in Cleveland, directing the Ohio Superintendent of Education to address the educational crisis in Cleveland's public schools. *See Reed v. Rhodes*, 869 F. Supp. 1274 (N.D. Ohio 1994). The Ohio legislature and the state's governor responded with the voucher program that is before us today. *See* Ohio Rev. Code §§ 3313.974-3313.979. We may safely assume that in fashioning the new law, the Ohio legislators and the governor knew that the challenge they faced was to design a law that would survive a federal constitutional challenge on Establishment Clause grounds. That is not to say that the statute the legislators wrote and the governor signed into law is insulated from federal judicial constitutional scrutiny. Rather, it is to say what the majority does not even acknowledge: this statute is *presumed* to be constitutional. *See McDonald v. Board of Election Comm'rs*, 394 U.S. 802, 809 (1969); *Hartford Fire Ins. Co. v. Lawrence, Dykes, Goodenberger, Bower & Clancy*, 740 F.2d 1362, 1366 (6th Cir. 1984). This presumption is not a mere literary figure for rote recitation in all appellate opinions addressing the constitutionality of legislative enactments; it is a bedrock rule of statutory construction, one we are bound assiduously to honor as we begin our assessment of the validity of the Ohio statute.

The first of the *Lemon* criteria that must be met if a statute is to survive an Establishment Clause challenge is that it have a "secular purpose." The Ohio voucher program meets this criterion and the plaintiffs agree that it does. The *sole* purpose of the voucher program is to save Cleveland's mostly poor, mostly minority, public school children from the

devastating consequences of requiring them to remain in the failed Cleveland schools, if they wish to escape. There is also no serious claim that the statute is constitutionally invalid solely because it fosters an "excessive entanglement" between government and religion. Rather, the only issue in the case is whether the voucher program has the forbidden "primary effect" of advancing religion. This court's first duty, therefore, after recognizing that *Nyquist*'s factually and legally outdated decision is of no help, is to proceed to examine the first two criteria from *Agostini*'s "impermissible effect" test to determine whether the effect of Ohio's voucher program is to advance religion, either because (1) the aid it provides results in governmental indoctrination, or (2) the program defines its recipients by reference to religion. *See Agostini*, 521 U.S. at 234. These are the *only* two issues properly before us.

A.

In addressing *Agostini*'s first criterion for testing a statute's claimed impermissible effect, we must ask whether the government aid in the form of the tuition voucher results in "governmental indoctrination." It is obvious that the Ohio statute does not have the remotest effect of providing governmental indoctrination in any religion, to say nothing of having such a primary effect.

The Supreme Court decisions since *Lemon* and *Nyquist* have emphasized that the critical question in determining whether government aid ultimately flowing to religious schools results in governmental indoctrination is if the recipient beneficiaries make a "genuinely independent and

private choice[ ]" to "spend" the funds in a religious school. *Id.* at 226 (internal quotation marks and citation omitted). If the recipients have such an independent and private choice, then the government's decision to provide the money to fund that choice does not have the effect of advancing religion. The government is, of necessity, neutral in the matter. Implicit in that constitutional rule of law, as it applies in this case, is that there must be a *genuine* choice from among a range of alternatives that indicate complete neutrality on the part of the government as to where the recipient parents may choose to spend the government-aid funds. The voucher program does not offend the Establishment Clause because the statute allows parents to make a *genuine* choice for their children who are currently in Cleveland public schools.

What are the choices Ohio has given these Cleveland parents?

(1) To permit their children to remain in the Cleveland public schools as before;

(2) To accept a tuition voucher for them to attend a Cleveland area nonreligious private school;

(3) To accept a tuition voucher for them to attend a Cleveland area religious private school;

(4) To accept a voucher for them to obtain special tutorial help in the Cleveland schools; or

(5) To accept a voucher for them to attend a public school in a district adjacent to

> Cleveland, although for the present these districts have declined to participate in the program.

See Ohio Rev. Code §§ 3313.976-3313.978.

It is difficult to imagine a statute that could afford its voucher recipients a broader spectrum of educational choice. It is true, of course, that the public school districts adjacent to Cleveland have declined to participate in the voucher program, but there is not the slightest hint in the record that when the Ohio statute was enacted either the legislators or the governor had any idea that the public school districts adjacent to Cleveland would not participate. What we measure today is not whether the children in Cleveland have the fullest conceivable range of options available to them that a panel of federal judges might think to be ideal, but rather, whether the statute, as enacted, has the primary effect of advancing religion by involving the state in governmental indoctrination under *Agostini*'s first criterion. *See Mitchell*, 120 S. Ct. at 2541-44. To my knowledge, no federal court has *ever* held that a school-choice voucher program is unconstitutional because the range of choices does not include a public school option; certainly the majority does not cite such a case.

B.

Neither does the Ohio program "define its recipients by reference to religion," the second *Agostini* factor for testing for "impermissible effect." *Agostini*, 521 U.S. at 234. The program defines the first-priority voucher recipients by

reference to (1) their attendance in one of Cleveland's public schools; and (2) a family income that is not more than 200 percent of the federally established poverty level. *See* Ohio Rev. Code § 3313.978(A). And the statute explicitly forbids a religious test for admission to a participating school, including religious schools. *See id.* at § 3313.976(A)(4). A parent has the choice of using the voucher in a private religious school, a private nonreligious school, for tutoring in the public school, or in a public school in a neighboring district if any wish to participate. The statute expresses no preference, explicitly or implicitly, either as to the religion of the voucher recipients, or if the recipient chooses a private school, whether the voucher is applied to a religious or nonreligious school.

The *Agostini* Court recognized, of course, that the eligibility requirements of a government-aid program could "have the effect of advancing religion by creating a financial incentive to undertake religious indoctrination." *Agostini*, 521 U.S. at 231. The Court noted that a financial incentive to choose a religious school over a nonreligious school is not present "where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." *Id.*

Despite the plain evidence that the aid to the parents of the Cleveland school children is indeed "allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis," *id.*, the majority continues to insist that the voucher program is not neutral

because it creates a forbidden "incentive" for parents in Cleveland to choose a religious school. As best I can understand it, they rest this conclusion — unsupported though it is by any evidence in the record — on two further conclusions. The first is that because the vast majority — 82 percent — of the private schools participating in the Ohio program are religious, the people of Cleveland are denied a "genuine" choice. This argument is made despite the indisputable fact that of *all* the private nonreligious private schools participating in the program, not one has ever turned away a voucher applicant for any reason. This not very thinly veiled antipathy the majority has shown toward religious schools — its argument that there are too many religious schools in the program — is meritless for another reason: the Supreme Court has flatly rejected the argument that a high percentage of religious schools participating in a government-aid program is an indicator that the government is engaging in governmental indoctrination of religion. *See Mitchell*, 120 S. Ct. at 2542; *id.* at 2562 (O'Connor, J., concurring); *Agostini*, 521 U.S. at 229; *Mueller*, 463 U.S. at 401.

Second, the majority then attempts to arouse support for its view that the Ohio statute creates a forbidden incentive for parents to choose a religious school by utilizing the shamefully transparent argument that this statute should be struck down because the religious schools in the program are too religious. In support of this proposition, the majority devotes considerable attention to the mission statements of several religious schools, which indicate the pervasively religious character of their programs. My brothers conclude therefrom that these schools "believe in interweaving

religious beliefs with secular subjects" and "incorporate [in their curriculum] religious concepts, motives, and themes." Slip op. at 5, 27. Imagine, religious schools that are truly religious!

This plainly hostile attack on the religious schools in the Ohio voucher program is one I would of thought unworthy of mention in an opinion from this great court. Is the point being made here that religious schools may participate in a voucher program providing they are not too religious? Or, is it that these poverty-level parents in Cleveland cannot be trusted to understand what they will be exposing their children to if they choose one of these religious schools? One would have thought that the nail was long ago driven into the coffin bearing the discredited arguments that if a voucher program involved too many religious schools, or if those involved are honestly, genuinely, and essentially religious, the statute is therefore invalid as "advancing religion." This most unattractive argument was utterly rejected in *Witters*, 474 U.S. at 486-88, and *Mueller*, 463 U.S. at 397-400, and also was rejected in Justice Powell's concurring opinion in *Witters*. *See Witters*, 474 U.S. at 492 (Powell, J., concurring). Moreover, Justice Thomas, writing for a clear majority *on this point* in *Mitchell*, stated:

> In short, nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it. This doctrine, born of bigotry, should be buried now.

Mitchell, 120 S. Ct. at 2552.

The majority, in this case, straining mightily to strike down this law, then conjures still another anti-voucher argument (the reader will recall that the majority's decisional premise is that this case is controlled by *Nyquist* and, implicitly, that all else is irrelevant).

My colleagues' next non-*Nyquist* argument is that the "school voucher program is not neutral in that it discourages the participation by schools not funded by religious institutions." Slip op. at 23. This statement in the majority opinion, which, like so many others in the opinion, is totally without any basis in the evidence, is then fortified by my brothers' *ipse dixit* that "religious schools often have lower overhead costs, supplemental income from private donations, and consequently lower tuition needs." *Id.* at 24. The only authority my colleagues offer for this speculation is a Fordham University Law Review article. I can only surmise that the point my colleagues wish to make here is that nonreligious schools will not participate in Ohio's voucher program because the voucher will not cover the cost of educating a student in a nonreligious school. This, my brothers reason, creates an "incentive" for the parents to send their children to the religious schools where they can be educated more efficiently and for fewer dollars.

There is absolutely no evidence in the record to support the majority's argument that the Ohio statute creates a financial "disincentive" for Cleveland's neighboring, suburban public school districts to participate in the program. There is no evidence to support what the majority seems to imply — that some parents wishing to use a voucher choose not to do so because other Cleveland area public schools are

not participating. And there is no evidence that if a public school chooses to participate in the voucher program, it will lose its state funding.

These arguments are built on a "factual" predicate that has absolutely no basis in the record. There is not a scintilla of evidence in this case that any school, public or private, has been discouraged from participating in the school voucher program because it cannot "afford" to do so. The import of this argument, as best I can understand it, is that the parents of the Cleveland school children have an "incentive" to choose Cleveland's religious schools because there are not enough nonreligious schools participating in the program. Of course, there is no evidence of that either. And there is no evidence that any of the several nonreligious, private schools participating in the program have *ever* rejected a single voucher applicant for any reason, including a supposed inability to afford the differential between the value of a $2,500 voucher and the actual cost of a nonreligious, private school education.

While I hesitate to dignify the majority's speculation with speculation of my own, what is at stake in this case is too important to let any of my colleagues' meritless arguments go unanswered.

Since it is indisputable that no nonreligious, private school, or any other school for that matter, has ever been discouraged from participating in the Cleveland voucher program and there is no evidence that any private school, religious or nonreligious, has ever turned away a voucher applicant for any reason. Therefore, what my colleagues must be getting at is even more insidious and offensive. The point

apparently is that Cleveland parents would never choose to send their children to a religious school in Cleveland if they could afford to send them to a nonreligious, private school, or another public school, but that they cannot do so because the cost differential between the value of a $2,500 voucher and the actual tuition of Cleveland's nonreligious, private schools is prohibitive. Again, it is of no small importance that there is absolutely no evidence in the record that any Cleveland public school parent has ever declined to enroll his or her child in a nonreligious, private school in Cleveland because there was a differential cost that was prohibitive. It is probably true that no private school, religious or nonreligious, can educate a child for the voucher value of $2,500. But, in all probability, the participating private schools are willing to accept the voucher as meeting a portion of the actual educational costs for these children and are willing to absorb the differential cost as part of their *pro bono* service in Cleveland to help save as many of these children as possible from the disastrous consequences of continuing in the city's failed public schools.

But more important than all of this speculation is the reality that the majority's "neutral only if affordable to all" test is utterly meritless *as a matter of law* because the now settled Establishment Clause jurisprudence is that whether aid is allocated on the basis of neutral, secular criteria is the key determinant of whether, having made the aid available, the state has engaged in governmental indoctrination in religion. *See Agostini*, 521 U.S. at 231.

If the simplicity and clarity of the Supreme Court's language in *Agostini* is not sufficient to demonstrate that the

Appendix A

Ohio statute does not in any respect operate to advance religion, confirmatory language of crystal clarity appears in the Supreme Court's recent decision in *Mitchell*. In a passage in his opinion which enjoys the support of a majority of the Justices, and arguably even the support of the dissenters, Justice Thomas states:

> [T]he question whether governmental aid to religious schools results in governmental indoctrination is ultimately a question whether any religious indoctrination that occurs in these schools could reasonably be attributed to governmental action.

Mitchell, 120 S. Ct. at 2541.

The line of cases decided in the Supreme Court beginning with *Mueller* in 1983 and ending with *Mitchell* in 2000 make it unmistakably clear that the majority's "impermissible incentive" argument has no basis in our Establishment Clause jurisprudence. The rule is now settled that a government program that permits financial aid ultimately to reach religious schools does not offend the Establishment Clause if the government's role in the program is neutral. Neutrality exists if the "governmental aid that goes to a religious institution does so 'only as a result of the genuinely independent and private choices of individuals.' " *Id.* (quoting *Agostini*, 521 U.S. at 226). Justice Thomas wrote that "simply because an aid program offers private schools, and thus religious schools, a benefit that they did not previously receive does not mean that the program, by reducing the cost of securing a religious education, creates

. . . an 'incentive' for parents to choose such an education for their children." *Id.* at 2543-44. Finally, Justice Thomas concluded that the possibility that government aid might be diverted by a sectarian school towards some religious end is irrelevant, for Establishment Clause purposes, if the government aid program provides the aid in a neutral manner. *See id.* at 2547.

In her concurring opinion in *Mitchell*, Justice O'Connor, joined by Justice Breyer, agreed that "neutrality is an important reason for upholding government-aid programs" against Establishment Clause challenges, but she reiterated that it was just one factor to consider in challenges to government school-aid programs and not a "factor [of] singular importance." *Id.* at 2556-57 (O'Connor, J., concurring). Even Justice Souter's dissenting opinion, which Justices Stevens and Ginsburg joined, conceded that the Establishment Clause presents no obstacle to government aid if it reaches sectarian schools as a result of the private choices of aid recipients. *See id.* at 2584 (Souter, J., dissenting).

Justice O'Connor emphasized the distinction between "true private-choice programs" and "per-capita school-aid programs." *Id.* at 2559 (O'Connor, J., concurring). The Ohio voucher program, like the programs in *Zobrest* and *Witters*, is a true private-choice program because the aid is given directly to eligible individuals, who in turn decide where to spend it. The programs considered in *Mitchell* and *Agostini* were examples of per-capita school-aid programs because aid was distributed based on the number of students attending each school, regardless of whether the school was religiously

based or not. Justice O'Connor concluded that true private-choice programs were more likely to survive Establishment Clause challenges, even though government aid was diverted to the religious schools, because " '[a]ny aid . . . that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients.' " *Id.* at 2558 (quoting *Witters*, 474 U.S. at 488) (O'Connor, J., concurring).

True private-choice programs, by their very nature, cannot have the forbidden "primary effect" of the government "advancing religion" because the aid is given directly to the beneficiary and that student or parent retains control over where the aid will be applied. "The fact that aid flows to the religious school and is used for the advancement of religion is therefore *wholly* dependent on the student's private decision." *Id.* at 2559. Furthermore, when government aid flows to a religious school as a result of "independent decisions made by numerous individuals . . . , [n]o reasonable observer is likely to draw from the facts . . . an inference that the State itself is endorsing a religious practice or belief." *Id.* (internal quotation marks and citation omitted).

The majority opinion in this case claims the voucher program "involves the grant of state aid directly and predominantly to the coffers of the private, religious schools." Slip op. at 27. Furthermore, according to the majority, "[t]here is no neutral aid when that aid principally flows to religious institutions . . . ." *Id.* at 27. The majority ignores that this view has been flat-out rejected by the Supreme Court in the decisions I have discussed which make it very clear that the *number* of religious schools participating

in the voucher program, the thoroughness of the religious training that occurs there, and the use to which such schools might put the funds are all totally irrelevant to the question of the government's neutrality, when the government aid reaches a religious school only as a result of the recipient's " 'genuinely independent and private choice[ ].' " *See Mitchell*, 120 S. Ct. at 2541 (citation omitted); *Zobrest*, 509 U.S. at 8; *Witters*, 474 U.S. at 486. By ignoring the recent Supreme Court cases emphasizing the importance of genuinely independent and private choices and the distinction between true private-choice programs and per-capita school-aid programs, the majority has failed to conduct a "meaningful" independent analysis of the voucher program's constitutionality.

III.

In summary, and to repeat, according to the Supreme Court, a true private-choice program does not result in "governmental indoctrination" so long as the path of the government aid is determined by the " 'genuinely independent and private choice[ ]' " of the aid recipients. *See Mitchell*, 120 S. Ct. at 2541 (citation omitted); *id.* at 2557-60 (O'Connor, J., concurring); *Agostini*, 521 U.S. at 226; *Zobrest*, 509 U.S. at 10, 12; *Witters*, 474 U.S. at 488; *Mueller*, 463 U.S. at 397-98, 400.

Ohio's voucher program easily meets this test. Before a voucher is "spent" at a religious school, Cleveland parents must independently make two important choices:

First, they must decide whether their child will take advantage of the voucher alternatives at all, or select another

option, such as remaining in the Cleveland schools, undertaking home schooling, or attending one of Cleveland's well regarded community schools. Second, if a child's parents choose the voucher option, they must make the further "genuinely independent and private choice[ ]" whether to use the voucher at a private school, nonreligious or religious, or for special tutoring in the Cleveland public schools. The voucher-use choice of attending a public school in a neighboring district is not presently available to Cleveland parents because no neighboring district has opted into the voucher program.

It is difficult to imagine how a voucher statute could be crafted that more clearly and decisively forecloses the government from having any role in the religious indoctrination of Cleveland school children, or forecloses it from defining the recipients of the vouchers by reference to religion, than through the range of free and independent choices the statute gives to the parents whose children attend the Cleveland public schools.

IV.

In striking down this statute today, the majority perpetuates the long history of lower federal court hostility to educational choice. It does so by reaching back to a 1973 Supreme Court decision, *Nyquist*, that construes a statute that is light years away from the voucher program before us and that rests upon law that has been altered in an important respect by subsequent Supreme Court decisions. My colleagues refuse to acknowledge that the program in *Nyquist* is factually distinguishable in essential ways from the Ohio

voucher program and that the Supreme Court has explicitly declared that the criteria for determining whether a statute authorizing government aid to schools violates the Establishment Clause have changed. And then, almost as if recognizing that its *Nyquist*-is-directly-on-point argument cannot withstand close scrutiny, the majority resorts to the lamentable tactic of attempting to arouse support for its view by making the familiar but unworthy arguments that the voucher program has too many religious schools and that they are too religious. This argument should fail, first, because it is rooted in nativist hostility toward religious schools and, second, because it has been explicitly rejected by the Supreme Court as a legitimate determinant of whether a government is engaging in religious indoctrination.

Despite the majority's disclaimer that "courts do not make educational policy; we do not sit in omnipotent judgment as to the efficacy of one scheme or program versus another," Slip op. at 9, the majority opinion is nothing more than an attack upon the philosophical and cultural desirability of publicly funded educational choice for the poor. This case and its result- sentencing nearly 4,000 poverty-level, mostly minority, children in Cleveland to return to the indisputably failed Cleveland public schools from which, in many cases, they escaped as long as three years ago-is an exercise in raw judicial power having no basis in the First Amendment or in the Supreme Court's Establishment Clause jurisprudence.

In all events, a matter of this gravity and of such immense importance to the Cleveland children who are directly affected, and indeed to the nation, should not be determined by just two judges of this court. Therefore, I respectfully

urge my colleagues to take this case for *en banc* review, if they are asked to do so, and decide the vitally important Establishment Clause issue it presents, after giving careful consideration to the full panoply of Supreme Court Establishment Clause jurisprudence, and not just one, inapposite 1973 case.

As to what is written in part IV of the majority opinion, I have no disagreement.

APPENDIX B — RELEVANT CODES

Ohio Rev. Code § 3313.974

§ 3313.974 Definitions.

As used in this section and in sections 3313.975 to 3313.979 of the Revised Code:

(A) "Individualized education program" and "handicapped child" have the same meanings as in section 3323.01 of the Revised Code.

(B) "Mainstreamed handicapped student" means a handicapped child who has an individualized education program providing for the student to spend more than half of each school day in a regular school setting with nonhandicapped students.

(C) "Separately educated handicapped student" means a handicapped child who has an individualized education program providing for the student to spend at least half of each school day in a class or setting separated from nonhandicapped students.

(D) "Low-income family" means a family whose income is below the level which the superintendent of public instruction shall establish.

(E) "Parent" has the same meaning as in section 3313.98 of the Revised Code.

(F) "Registered private school" means a school registered with the superintendent of public

instruction pursuant to section 3313.976 of the Revised Code.

(G) "Alternative school" means a registered private school located in a school district or a public school located in an adjacent school district.

(H) "Tutorial assistance" means instructional services provided to a student outside of regular school hours approved by the commission on school choice pursuant to section 3313.976 of the Revised Code.

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Ohio Rev. Code § 3313.975

§ 3313.975 Pilot project scholarship program established.

As used in this section and in sections 3313.975 to 3313.979 of the Revised Code, "the pilot project school district" or "the district" means any school district included in the pilot project scholarship program pursuant to this section.

(A) The superintendent of public instruction shall establish a pilot project scholarship program and shall include in such program any school districts that are or have ever been under federal court order requiring supervision and operational management of the district by the state superintendent. The program shall provide for a number of students residing in any such district to receive scholarships to attend alternative schools, and for an equal number of

students to receive tutorial assistance grants while attending public school in any such district.

(B) The state superintendent shall establish an application process and deadline for accepting applications from students residing in the district to participate in the scholarship program. In the initial year of the program students may only use a scholarship to attend school in grades kindergarten through third.

The state superintendent shall award as many scholarships and tutorial assistance grants as can be funded given the amount appropriated for the program. In no case, however, shall more than fifty per cent of all scholarships awarded be used by students who were enrolled in a nonpublic school during the school year of application for a scholarship.

(C)(1) The pilot project program shall continue in effect each year that the general assembly has appropriated sufficient money to fund scholarships and tutorial assistance grants. In each year the program continues, no new students may receive scholarships unless they are enrolled in grade kindergarten, one, two, or three. However, any student who has received a scholarship the preceding year may continue to receive one until the student has completed grade eight.

(2) If the general assembly discontinues the scholarship program, all students who are

attending an alternative school under the pilot project shall be entitled to continued admittance to that specific school through all grades up to the eighth grade that are provided in such school, under the same conditions as when they were participating in the pilot project. The state superintendent shall continue to make scholarship payments in accordance with division (A) or (B) of section 3313.979 of the Revised Code for students who remain enrolled in an alternative school under this provision in any year that funds have been appropriated for this purpose.

If funds are not appropriated, the tuition charged to the parents of a student who remains enrolled in an alternative school under this provision shall not be increased beyond the amount equal to the amount of the scholarship plus any additional amount charged that student's parent in the most recent year of attendance as a participant in the pilot project, except that tuition for all the students enrolled in such school may be increased by the same percentage.

(D) Notwithstanding sections 124.39, 3307.54, and 3319.17 of the Revised Code, if the pilot project school district experiences a decrease in enrollment due to participation in a state-sponsored scholarship program pursuant to sections 3313.974 to 3313.979 of the Revised Code, the district board of education may enter into an agreement with any teacher it

employs to provide to that teacher severance pay or early retirement incentives, or both, if the teacher agrees to terminate the employment contract with the district board, provided any collective bargaining agreement in force pursuant to Chapter 4117. of the Revised Code does not prohibit such an agreement for termination of a teacher's employment contract.

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Ohio Rev. Code § 3313.976

§ 3313.976 Eligibility of private schools and public schools in adjacent districts; tutorial assistance.

(A) No private school may receive scholarship payments from parents pursuant to section 3313.979 of the Revised Code until the chief administrator of the private school registers the school with the superintendent of public instruction. The state superintendent shall register any school that meets the following requirements:

(1) The school is located within the boundaries of the pilot project school district;

(2) The school indicates in writing its commitment to follow all requirements for a state-sponsored scholarship program specified under sections 3313.974 to 3313.979 of the Revised Code, including, but not limited to, the requirements for admitting students pursuant to section 3313.977 of the Revised Code;

(3) The school meets all state minimum standards for chartered nonpublic schools in effect on July 1, 1992, except that the state superintendent at the superintendent's discretion may register nonchartered nonpublic schools meeting the other requirements of this division;

(4) The school does not discriminate on the basis of race, religion, or ethnic background;

(5) The school enrolls a minimum of ten students per class or a sum of at least twenty-five students in all the classes offered;

(6) The school does not advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion;

(7) The school does not provide false or misleading information about the school to parents, students, or the general public;

(8) The school agrees not to charge any tuition to low-income families participating in the scholarship program in excess of ten per cent of the scholarship amount established pursuant to division (C)(1) of section 3313.978 of the Revised Code, excluding any increase described in division (C)(2) of that section. The school shall

permit any such tuition, at the discretion of the parent, to be satisfied by the low-income family's provision of in-kind contributions or services.

(B) The state superintendent shall revoke the registration of any school if, after a hearing, the superintendent determines that the school is in violation of any of the provisions of division (A) of this section.

(C) Any public school located in a school district adjacent to the pilot project district may receive scholarship payments on behalf of parents pursuant to section 3313.979 of the Revised Code if the superintendent of the district in which such public school is located notifies the state superintendent prior to the first day of March that the district intends to admit students from the pilot project district for the ensuing school year pursuant to section 3327.06 of the Revised Code.

(D) Any parent wishing to purchase tutorial assistance from any person or governmental entity pursuant to the pilot project program under sections 3313.974 to 3313.979 of the Revised Code shall apply to the state superintendent. The state superintendent shall approve providers who appear to possess the capability of furnishing the instructional services they are offering to provide.

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Appendix B

Ohio Rev. Code § 3313.977

§ 3313.977 Admission of students to registered private school.

(A)(1) Each registered private school shall admit students to kindergarten and first, second, and third grades in accordance with the following priorities:

(a) Students who were enrolled in the school during the preceding year;

(b) Siblings of students enrolled in the school during the preceding year, at the discretion of the school;

(c) Children from low-income families attending school or residing in the school district in which the school is located until the number of such students in each grade equals the number that constituted twenty per cent of the total number of students enrolled in the school during the preceding year in such grade. Admission of such twenty per cent shall be by lot from among all low-income family applicants who apply prior to the fifteenth day of February prior to admission.

(d) All other applicants residing anywhere, provided that all

remaining available spaces shall be filled from among such applicants by lot.

Children from low-income families not selected by lot under division (A)(1)(c) of this section shall be included in the lottery of all remaining applicants pursuant to division (A)(1)(d) of this section.

(2) Each registered private school shall first admit to grades four through eight students who were enrolled in the school during the preceding year. Any remaining spaces for students in these grades may be filled as determined by the school.

(B) Notwithstanding division (A) of this section, except where otherwise prohibited by federal law, a registered private school may elect to admit students of only one gender and may deny admission to any separately educated handicapped student.

(C) If a scholarship student who has been accepted in accordance with this section fails to enroll in the school for any reason or withdraws from the school during the school year for any reason, the school may elect to replace such student with another scholarship student only by first offering the admission to any low-income scholarship students who filed applications by the preceding fifteenth day of February and who were not accepted at that time due to space limitations.

* * *

Appendix B

Ohio Rev. Code § 3313.978

§ 3313.978 Implementation of program by state superintendent and school officials; scholarships and tutorial assistance grants.

(A) Annually by the first day of November, the superintendent of public instruction shall notify the pilot project school district of the number of initial scholarships that the state superintendent will be awarding in each of grades kindergarten through third.

The state superintendent shall provide information about the scholarship program to all students residing in the district, shall accept applications from any such students until such date as shall be established by the state superintendent as a deadline for applications, and shall establish criteria for the selection of students to receive scholarships from among all those applying prior to the deadline, which criteria shall give preference to students from low-income families. For each student selected, the state superintendent shall also determine whether the student qualifies for seventy-five or ninety per cent of the scholarship amount. Students whose family income is at or above two hundred per cent of the maximum income level established by the state superintendent for low-income families shall qualify for seventy-five per cent of the scholarship amount and students whose family income is below two hundred per cent of that maximum income level shall qualify for ninety per cent of the scholarship amount. The state superintendent shall notify students of their selection prior to the fifteenth day of January and whether they qualify for seventy-five or ninety per cent of the scholarship amount.

Appendix B

(1) A student receiving a pilot project scholarship may utilize it at an alternative public school by notifying the district superintendent, at any time before the beginning of the school year, of the name of the public school in an adjacent school district to which the student has been accepted pursuant to section 3327.06 of the Revised Code.

(2) A student may decide to utilize a pilot project scholarship at a registered private school in the district if all of the following conditions are met:

(a) By the fifteenth day of February of the preceding school year, or at any time prior to the start of the school year, the parent makes an application on behalf of the student to a registered private school.

(b) The registered private school notifies the parent and the state superintendent as follows that the student has been admitted:

(i) By the fifteenth day of March of the preceding school year if the student filed an application by the fifteenth day of February and was admitted by the school pursuant to division (A) of section 3313.977 of the Revised Code;

(ii) Within one week of the decision to admit the student if the student is admitted pursuant to

division (C) of section 3313.977 of the Revised Code.

(c) The student actually enrolls in the registered private school to which the student was first admitted or in another registered private school in the district or in a public school in an adjacent school district.

(B) The state superintendent shall also award in any school year tutorial assistance grants to a number of students equal to the number of students who receive scholarships under division (A) of this section. Tutorial assistance grants shall be awarded solely to students who are enrolled in the public schools of the district in a grade level covered by the pilot project. Tutorial assistance grants may be used solely to obtain tutorial assistance from a provider approved pursuant to division (D) of section 3313.976 of the Revised Code.

All students wishing to obtain tutorial assistance grants shall make application to the state superintendent by the first day of the school year in which the assistance will be used. The state superintendent shall award assistance grants in accordance with criteria the superintendent shall establish. For each student awarded a grant, the state superintendent shall also determine whether the student qualifies for seventy-five or ninety per cent of the grant amount and so notify the student. Students whose family income is at or above two hundred per cent of the maximum income level established by the state superintendent for low-income families shall qualify for seventy-five per cent of the grant amount and students whose family income is below two hundred per cent of that maximum income level shall qualify for ninety per cent of the grant amount.

Appendix B

(C)(1) In the case of basic scholarships, the scholarship amount shall not exceed the lesser of the tuition charges of the alternative school the scholarship recipient attends or an amount established by the state superintendent not in excess of twenty-five hundred dollars.

(2) The state superintendent shall provide for an increase in the basic scholarship amount in the case of any student who is a mainstreamed handicapped student and shall further increase such amount in the case of any separately educated handicapped child. Such increases shall take into account the instruction, related services, and transportation costs of educating such students.

(3) In the case of tutorial assistance grants, the grant amount shall not exceed the lesser of the provider's actual charges for such assistance or a percentage established by the state superintendent, not to exceed twenty per cent, of the amount of the pilot project school district's average basic scholarship amount.

(4) No scholarship or tutorial assistance grant shall be awarded unless the state superintendent determines that twenty-five or ten per cent, as applicable, of the amount specified for such scholarship or grant pursuant to division (C)(1), (2), or (3) of this section will be furnished by a political subdivision, a private nonprofit or for profit entity, or another person. Only seventy-five or ninety per cent of such amounts, as applicable, shall be paid from state funds pursuant to section 3313.979 of the Revised Code.

(D)(1) Annually by the first day of November, the state superintendent shall estimate the maximum per-pupil scholarship amounts for the ensuing school year. The state superintendent shall make this estimate available to the general public at the offices of the district board of education together with the forms required by division (D)(2) of this section.

> (2) Annually by the fifteenth day of January, the chief administrator of each registered private school located in the pilot project district and the principal of each public school in such district shall complete a parental information form and forward it to the president of the board of education. The parental information form shall be prescribed by the department of education and shall provide information about the grade levels offered, the numbers of students, tuition amounts, proficiency examination results, and any sectarian or other organizational affiliations.

* * *

Ohio Rev. Code § 3313.979

§ 3313.979 Payment of scholarships and grants to parents or to school district; monthly reports by private school

Each scholarship or grant to be used for payments to a registered private school or to an approved tutorial assistance provider is payable to the parents of the student entitled to the scholarship or grant. Each scholarship to be used for payments to a public school in an adjacent school district is

payable to the school district of attendance by the superintendent of public instruction.

(A)(1) By the fifteenth day of each month of the school year that any scholarship students are enrolled in a registered private school, the chief administrator of that school shall notify the state superintendent of:

(a) The number of students who were reported to the school district as having been admitted by that private school pursuant to division (A)(2)(b) of section 3313.978 of the Revised Code and who were still enrolled in the private school as of the first day of such month, and the numbers of such students who qualify for seventy-five and ninety per cent of the scholarship amount;

(b) The number of students who were reported to the school district as having been admitted by another private school pursuant to division (A)(2)(b) of section 3313.978 of the Revised Code and since the date of admission have transferred to the school providing the notification under division (A)(1) of this section, and the numbers of such students who qualify for

seventy-five and ninety per cent of the scholarship amount.

(2) From time to time, the state superintendent shall make a payment to the parent of each student entitled to a scholarship. Each payment shall include for each student reported under division (A)(1) of this section, a portion of seventy-five or ninety per cent, as applicable, of the scholarship amount specified in divisions (C)(1) and (2) of section 3313.978 of the Revised Code. This amount shall be proportionately reduced in the case of any such student who is not enrolled in a registered private school for the entire school year.

(3) The first payment under this division shall be made by the last day of November and shall equal one-third of seventy-five or ninety per cent, as applicable, of the estimated total amount that will be due to the parent for the school year pursuant to division (A)(2) of this section.

(B) The state superintendent, on behalf of the parents of a scholarship student enrolled in a public school in an adjacent school district pursuant to section 3327.06 of the Revised Code, shall make the tuition payments required by that section to the school district admitting the student, except that, notwithstanding sections 3323.13, 3323.14, and 3327.06 of the Revised Code, the total payments in

any school year shall not exceed seventy-five or ninety per cent, as applicable, of the scholarship amount provided in divisions (C)(1) and (2) of section 3313.978 of the Revised Code.

(C) Whenever an approved provider provides tutorial assistance to a student, the state superintendent shall pay the parent for such costs upon receipt of a statement from the parent specifying the services provided and the costs of the services, which statement shall be signed by the provider. The total payments to any parent under this division for all provider services to any individual student in any school year shall not exceed seventy-five or ninety per cent, as applicable, of the grant amount provided in division (C)(3) of section 3313.978 of the Revised Code.

* * * *

APPENDIX C — RELEVANT AFFIDAVITS

AFFIDAVIT OF ELAINE BARCLAY

STATE OF OHIO :
: **ss.**
COUNTY OF CUYAHOGA :

ELAINE BARCLAY, being first duly sworn, makes the following statement concerning her children who have received Pilot Project Scholarships to attend St. John Nottingham Lutheran School:

1. Two of my children are Scholarship Students at St. John Nottingham Lutheran School. We are an African-American family and our faith tradition is Christianity. I am very pleased with the Scholarship Program because it helps me get a better education for my children that I couldn't otherwise afford.

2. We selected St. John Nottingham School because of the superior academic offerings and because teachers are more personable.

3. We are not members of the Lutheran Church. The school respects our religious beliefs and practices and does not pressure us to believe and accept everything it does.

4. We are pleased with the choice for our children and the main difference between this and the public school is the extent to which the teachers are more personable and reflect more concern for the student's education.

Appendix C

FURTHER AFFIANT SAYETH NAUGHT.

s/ Elaine Barclay
ELAINE BARCLAY

Sworn to before me and subscribed in my presence this 11th day of November 1999.

s/ Anthony John Bisceglia
Notary Public
My commission expires:
12/14/2002

Appendix C

AFFIDAVIT OF TERRI L. BARLOW

STATE OF OHIO :
: **ss.**
COUNTY OF CUYAHOGA :

TERRI L. BARLOW, being first duly sworn, makes the following affidavit concerning her teaching at St. John Nepomucene Catholic School:

1. I am Caucasian and a member of the United Methodist Church. I have chosen to teach in a Catholic School for several reasons, one being the respect that is being shown for students and teachers. I believe that St. John Nepomucene has developed several educational programs that are uniquely beneficial to the children in this school.

2. The phonics and math programs are excellent in this school. The problem that comes when a child transfers from a public school is that they are not at the level as their peers at this school. Ninety percent of the time they are behind anywhere from six to nine months. This, of course, creates stress on the child and greater responsibility for the school to help with the transition and integration. We normally can get the child caught up but it can take months, if not years.

3. Even though I am a teacher at a Catholic School, I continue to believe and practice my religious faith as I have all my life. I do not make the sign of the cross or kneel and have not been told that I should do so. I always provide explanations to my students about my church and the ways we believe. They seem to understand. I also show respect for their beliefs.

Appendix C

FURTHER AFFIANT SAYETH NAUGHT.

s/ Terri L. Barlow
TERRI L. BARLOW

Sworn to before me and subscribed in my presence this __ day of November 1999.

s/ Beverly Poirrier
Notary Public
My commission expires:
September 16, 2002
[stamp]

Appendix C

AFFIDAVIT OF JUANITA BEASLEY

STATE OF OHIO :
: **ss.**
COUNTY OF CUYAHOGA :

JUANITA BEASLEY, being first duly sworn, makes the following Affidavit concerning her teaching at Our Lady of Good Counsel School:

1. I am a member of the Church of Christ and my racial background is white. Many of our students come from large families and would not be able to attend our school without the Scholarship Program. They would have no choice but to send their children to public school which they feel would be harmful to their children.

2. The Scholarship pupils find that the rules of behavior are more strictly applied at our school. Students are expected to behave in a respectful manner. Academic standards are higher.

3. Since I am not of the Catholic faith, I do not teach religion classes. No one has ever said or done anything to make me uncomfortable insofar as I am not a member of the Catholic faith.

4. I believe that the Scholarship Program has helped parents choose an educational program that best meets the needs of their children.

Appendix C

FURTHER AFFIANT SAYETH NAUGHT.

s/ Juanita B. Beasley
JUANITA BEASLEY

Sworn to before me and subscribed in my presence this 11th day of November 1999.

s/ Steve Delchin
Attorney At Law
Notary Public
My commission expires:
My commission has no expiration date. Section 147.03 R. C.
[stamp]

Appendix C

AFFIDAVIT OF WENDY BERNING

STATE OF OHIO :
: **ss.**
COUNTY OF CUYAHOGA :

WENDY BERNING, being first duly sworn, makes the following affidavit concerning her children who are Scholarship Pupils at St. Vincent De Paul Catholic School:

1. My racial background is white and my faith tradition is Christian. I am not a member of the Catholic faith. I selected St. Vincent De Paul School because it was able to provide special help to weaknesses my older son had in school. Grades have really picked up since his transfer to St. Vincent De Paul.

2. I exercise my choice by selecting this school because I had good reports about the quality of education that my children would receive. My older son is able to concentrate much better on his work and is more successful in the peaceful educational atmosphere at this school.

3. Neither I nor my children have felt any discomfort because we are not of the Catholic faith. We do not experience any pressure to accept the teachings of that church. I understood that this was a Catholic School when I selected it for my children. I selected the School knowing that religion was part of the program. The School has not overstepped in my opinion. The School reinforces the same gospel message that I teach at home. It reinforces values that should apply to everyone in society.

Appendix C

FURTHER AFFIANT SAYETH NAUGHT.

s/ Wendy Berning
WENDY BERNING

Sworn to before me and subscribed in my presence this 11th day of November 1999.

s/ Steve Delchin
Attorney At Law
Notary Public
My commission expires:
My commission has no expiration date. Section 147.03 R. C.
[stamp]

Appendix C

AFFIDAVIT OF GWENDOLYN BRACKINS

State Of Ohio :
: **ss.**
County Of Cuyahoga :

Gwendolyn Brackins, being first duly cautioned and sworn, makes the following Affidavit concerning the Cleveland Pilot Tuition Grant Program:

1. My son Gregory is a third grade Scholarship student at Immaculate Conception School. We are African-American and members of the Baptist Church.

2. The Scholarship Program has enabled by son to attend a more favorable educational setting than I could have possibly afforded on my own. I appreciate the strict discipline and believe that it is important for students.

3. We have found that, because Immaculate Conception School is very multi-racial, the students don't pay attention to color or someone being different from them. It's a great atmosphere. I also appreciate the Christian values stressed at the school and believe my son is getting a very good education.

Further Affiant Sayeth Naught.

s/ Gwendolyn Brackins
Gwendolyn Brackins

Appendix C

Sworn to before me and subscribed in my presence this 11th day of November 1999.

s/ Anthony John Bisceglia
Notary Public
My commission expires:
12/14/2002

Appendix C

AFFIDAVIT OF PAMELA BRADLEY

STATE OF OHIO :
: **ss.**
COUNTY OF CUYAHOGA :

PAMELA BRADLEY, being first duly sworn, presents this Affidavit concerning the Scholarship Program at St. Francis School:

1. I reside at 1160 East 77th Avenue in Cleveland, Ohio 44103. I am of the Baptist faith and we are an African-American family. My daughter transferred to St. Francis School this year and she is enrolled as a Scholarship pupil. I could not afford to send her to this school without this help. I am very grateful that the Program is available for us. It allows me to become much more active in my child's education. My child has enjoyed this school year more than she ever has in the past. The school environment is peaceful and more acceptable to her.

2. I interviewed other schools before selecting St. Francis. The reason I selected this school was that the staff seem very competent, nice, friendly and respectful. I sensed a loving attitude and concern for children in the building.

3. I have noticed my child has improved in reading and she really loves to read now. My child attended Wade Park Public School last year and did not do very well in school. I am attaching the progress report showing how well my daughter is doing this year as Exhibit A.

Appendix C

4. The fact that I have selected a Catholic school and we are of the Baptist faith has created no problems. There has been no pressure to alter our beliefs. The school teaches respect for all persons and that God loves all creatures regardless of the Church that they attend.

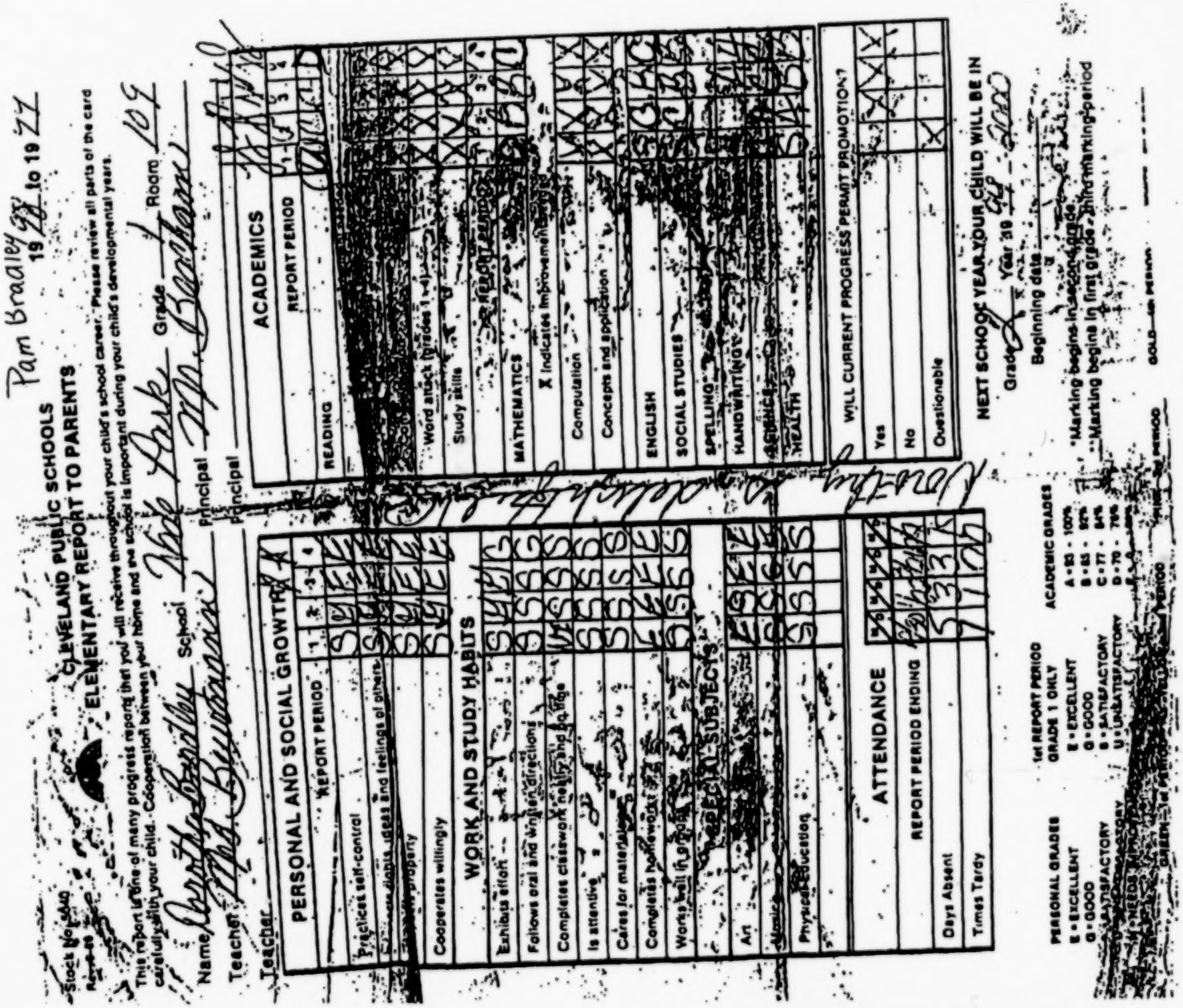
s/ Pamela Bradley
PAMELA BRADLEY

Sworn to before me and subscribed in my presence this 11th day of November 1999.

s/ Anthony John Bisceglia
Notary Public
My commission expires:
12/14/2002

Appendix C

EXHIBIT A



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Appendix C

1. Teacher Comment:	Parent Comment: Pamela Bradley Parent Signature
2. Teacher Comment:	Parent Comment: Parent Signature
3. Teacher Comment:	Parent Comment: Parent Signature
4. Teacher Comment:	

ST. FRANCIS SCHOOL

CLEVELAND, OHIO

PRIMARY

Dorothy Bradley

PUPIL NAME

Miss Boehlen

Gr. 2 1999-00

TEACHER

GRADE

YEAR

Appendix C

Bradley, Dorothy

	1	2	3	4
KNOWLEDGE OF CHRISTIAN DOCTRINE	E			
READING	A			
PHONICS	A			
MATH	B			
LANGUAGE				
SPELLING	A			
DAYS ABSENT	0			
DAYS TARDY	0			

	1	2	3	4
HANDWRITING	S			
SOCIAL STUDIES	E			
SCIENCE	E			
HEALTH				
MUSIC				
ART	E			
PHYS. ED.	E			
COMPUTER	S			
Effort	E			
Conduct	E			
Homework	S+			

Grade Scale:
A - 100 - 93% -- Excellent
B - 92 - 85% -- Above Average
C - 84 - 77% -- Average
D - 76 - 70% -- Below Average
F - 69 % and Below is Failure

E = Excellent
S = Satisfactory
I = Improving
N = Needs Improvement
U = Unsatisfactory

Promoted to Grade _____

Appendix C

AFFIDAVIT OF DELPHIA CLEMONS

STATE OF OHIO :
: **ss.**
COUNTY OF CUYAHOGA :

DELPHIA CLEMONS, being first duly sworn, makes the following statement concerning her legal ward Delina Smith, who is attending a Scholarship School at St. Joseph Collinwood School:

1. I am African-American and my faith tradition is Baptist. I have chosen St. Joseph Collinwood for my legal ward because she is being academically challenged there and I feel comfortable that she is being educated in a safe and calm atmosphere and that she now enjoys going to school. I am comforted by the high quality of instruction and information she has received since transferring from the public school to St. Joseph Collinwood School.

2. Before choosing St. Joseph, my friends recommended it to me because of its high educational standards. The year before my child attended St. Joseph, over 95% of the eighth graders had successfully passed all parts of the Ohio Ninth Grade Proficiency Test.

3. The curriculum at St. Joseph is more extensive and sometimes more advanced then the curriculum in the public schools. The disciplinary policies and procedures are enforced and the Principal and teachers have control over the students, unlike what I had seen in the public school system. Delina was a good student in the public school and is a good student at St. Joseph Collinwood. Her math skills

are now exceeding expectations and she is performing a more advanced level of math in her class assignments. My child was bored in the public school and we appreciate the more extensive curriculum that has made a big difference for Delina. St. Joseph has offered her the challenge she needs to continue to strive for success.

4. Delina is very active in her own Baptist religious activities and has never been pressured to follow the traditional faith of the school. I appreciated the fact that the school advised us about its religious sponsorship and mission before we selected it. However, it was also made clear that the school would respect other religious beliefs. Delina understands that there are different denominations and practices attending the school and she is attending St. Joseph for educational advantages rather than because of its religious sponsorship. In any event, we appreciated receiving advance notice of the sponsorship and tradition, since this has helped Delina understand the differences between that tradition and her own religious beliefs.

s/ Delphia Collins
DELPHIA CLEMONS

Sworn to before me and subscribed in my presence this 10th day of November 1999.

s/ David L. Hoehnen
Attorney At Law
Notary Public
My commission expires:
My commission has no expiration date. Section 147.03 R. C.
[stamp]

Appendix C

AFFIDAVIT OF ADRA CLEVELAND

STATE OF OHIO :
: **ss.**
COUNTY OF CUYAHOGA :

ADRA CLEVELAND, being first duly sworn, makes the following statement concerning her children's enrollment as scholarship pupils at Metro Catholic School:

1. I reside at 3169 W. 97th Street, Cleveland, Ohio 44102. I am African American and am not a member of the Catholic faith. Both of my children are scholarship pupils.

2. I selected Metro Catholic School because I believed they would receive a better education in reading, writing and math. The school gives good individual attention to students that are weak in some areas; keeps the parent advised or progress.

3. I chose Metro Catholic because it is close to home and because it has a good cultural mix of students. It also provides good discipline and is well organized in programs and academics. My son has greatly improved on his reading skills since enrollment at Metro Catholic. He indicates his joy at attending school. When he was in the public school it was a struggle to get him motivated to attend.

4. I have not chosen a religious faith at the present time. I was brought up in the Jehovah Witness faith. I don't feel that this school pressures my children to accept the Catholic faith. The diversity in this school gives my children an

opportunity to exercise choice. They can see and learn about religions and realize they have a free choice for schools and religion.

FURTHER AFFIANT SAYETH NAUGHT.

s/ Adra Cleveland
ADRA CLEVELAND

Sworn to before me and subscribed in my presence this 11th day of November 1999.

s/ Steve Delchin
Attorney At Law
Notary Public
My commission expires:
My commission has no expiration date. Section 147.03 R. C.
[stamp]

Appendix C

AFFIDAVIT OF WILLA CLOUD

STATE OF OHIO :
: **ss.**
COUNTY OF CUYAHOGA :

WILLA CLOUD, being first duly sworn, makes the following affidavit relating to her granddaughter's enrollment as scholarship pupil at the St. Vitus Catholic School:

1. My granddaughter and I are African Americans and our faith tradition is Protestant.

2. As Tiffany's grandmother, I am responsible for her education. I have health problems and feel much more secure that Tiffany is able to attend St. Vitus School. She really enjoys St. Vitus. The staff has been very helpful and understanding. I am very grateful to the scholarship program because it gives parents the choice of bettering their children's education.

3. I selected St. Vitus School for Tiffany because I believe it has a better educational program to offer than the other schools.

4. Since Tiffany has attended St. Vitus School, she has demonstrated progress in Spelling, English, Math and Handwriting.

5. St. Vitus has been very respectful of the fact that my granddaughter and I are Protestant. Tiffany participates in the choir and no one has any degree of disrespect for her

Appendix C

being of a different religious faith. The diversity at the school gives her a better understanding of different religious faiths.

FURTHER AFFIANT SAYETH NAUGHT.

s/ Willa Cloud
WILLA CLOUD

Sworn to before me and subscribed in my presence this __ day of November 1999.

s/ Anthony John Bisceglia
Notary Public
My commission expires:
12/14/2002

Appendix C

AFFIDAVIT OF SHARON COOK

STATE OF OHIO :
: **ss.**
COUNTY OF CUYAHOGA :

SHARON COOK, being first duly sworn, makes the following Affidavit concerning her son's enrollment as a Scholarship Student at St. John Cantius School:

1. I am an African-American and am not a member of the Catholic religious faith. My son is a Scholarship pupil at St. John Cantius School.

2. My son is doing very well in St. John Cantius School because he receives individualized help from his teachers and has a small and intimate teaching environment. It would be very sad if I would have to remove him from this teaching environment that he accepts so well.

3. I believe that my son's educational progress is attributable to the teaching staff at St. John Cantius.

4. There is no pressure upon my son concerning religious beliefs. He and I discuss what he learns at school and, if there are things that I don't believe I convey this to my son.

5. I have never been told that my son or I have to attend any Church devotional services. He is not made to feel bad if he elects not to participate. He is very comfortable

in this school and I believe that he is getting the best education that will help him become a good person.

s/ Sharon Cook
SHARON COOK

Sworn to before me and subscribed in my presence this 11th day of November 1999.

s/ Steve Delchin
Attorney At Law
Notary Public
My commission expires:
My commission has no expiration date. Section 147.03 R. C.
[stamp]

Appendix C

AFFIDAVIT OF DIANE COVER

STATE OF OHIO :
: **ss.**
COUNTY OF CUYAHOGA :

DIANE COVER, being first duly sworn, makes the following affidavit concerning her service as a teacher at St. Ignatius Catholic School:

1. My faith tradition is Protestant, Congregational Church. My racial background is Caucasian. I teach at St. Ignatius Catholic School and St. Ignatius is registered to accept scholarship pupils. There are 120 such pupils enrolled in the school this year. They are receiving an excellent education.

2. I remain as a teacher at this school even though I could make more money elsewhere because I know I can make a difference in a child's life. I know my fellow teachers care more about the quality of education given to the children than the money they make. Neither the teachers nor the students not of the Catholic faith are required to participate in the devotional exercises. I can recall when one of our former Jewish teachers was teaching the 7th and 8th grade English. She was allowed to teach the students the customs and traditions of the Jewish faith. These students learned to understand and accept other religions because of her interaction with them.

Appendix C

FURTHER AFFIANT SAYETH NAUGHT.

s/ Diane Cover
DIANE COVER

Sworn to before me and subscribed in my presence this ____ day of November 1999.

s/ Steve Delchin
Attorney At Law
Notary Public
My commission expires:
My commission has no expiration date. Section 147.03 R. C.
[stamp]

Appendix C

AFFIDAVIT OF MARILYN CULLER

STATE OF OHIO :
: **ss.**
COUNTY OF CUYAHOGA :

MARILYN CULLER, being first duly sworn, makes the following Affidavit concerning her role as a teacher at St. Mel's Scholarship School:

1. I am a member of the Lutheran Church. This is my first year teaching at St. Mel's, but I have taught at other non-public and public schools.

2. I have witnessed children transfer from the public schools and have observed improved educational attitudes and educational achievement. Children and their parents seem to uniformly appreciate the safe and caring environment at our school.

3. The public school students who have transferred to our school have learned that hard work and perseverance can lead to higher expectations for themselves now and in the future. The students experience a structured discipline program and high expectations shared by both faculty and parents.

4. I have not been asked to teach about the Catholic faith in my courses, but I am able to guide students towards the awareness of such virtues as self-discipline, work and perseverance which can be used in their daily lives. Virtues I try to inculcate can be used by Jewish, Muslim or Christian students alike.

Appendix C

5. I appreciate that the school respects me as a person who has different religious beliefs. I appreciate being included in attendance at prayers and devotional exercises. The school does provide devotional exercises, religious training and prayer, but there is no requirement to teach the tenets of the Catholic faith in the secular courses.

6. The public children are receiving excellent education in the State-required courses.

FURTHER AFFIANT SAYETH NOT.

s/ Marilyn Culler
MARILYN CULLER

Sworn to before me and subscribed in my presence this 11th day of November 1999.

s/ Steve Delchin
Attorney At Law
Notary Public
My commission expires:
My commission has no expiration date. Section 147.03 R. C.
[stamp]

Appendix C

AFFIDAVIT OF LOUIS DALTON

STATE OF OHIO :
: **ss.**
COUNTY OF CUYAHOGA :

LOUIS DALTON, being first duly sworn, makes the following Affidavit concerning the appropriate mission of Catholic sponsored schools in the Diocese of Cleveland:

1. My name is Louis Dalton and I have been serving as Director of the Ohio Catholic School Accrediting Association since 1995. My responsibilities include working with the principals of the Catholic schools throughout the State to insure proper accreditation and to help develop training for self-study programs which will assess the extent to which accreditation requirements are met. I received a Masters degree in Theology at Catholic University of America in Washington, D.C., in 1976. I have taught as a high school teacher and thereafter served in the education office of the Catholic Diocese of Columbus as coordinator for curriculum. Thereafter I served as the Director of Religious Education for the Diocese of Columbus for five years. In 1995, I was selected to serve as Director of the Ohio Catholic School Accrediting Association and have continued in that capacity to the present date.

2. I have had occasion to review a large number of the documents that have been presented in this case as the Mission Statements of Catholic sponsored schools in the Diocese of Cleveland and can state unequivocally that they do not totally reflect the mission of the school or the standards

that must be met for accreditation. None of these Statements addresses the planning and implementation relating to integration of the Scholarship pupils into these educational programs; neither do they fully address how the State-mandated secular courses are taught and how these schools attempt to provide formation in fundamental Christian values essential to proper functioning in family, community, society and the world.

3. All Catholic sponsored schools must recognize that the parent has the ultimate authority over the education of the child. All of the Catholic Diocesan schools recognize that, to varying degrees, students in those schools are not members of the Catholic Church, nor are they all Christians. Religious freedom and the personal conscience of individual students and their families must be respected and this freedom is explicitly recognized by the Catholic Church. Parents not of the faith whose children enroll in these schools are clearly advised that the schools do work from a set of beliefs, values and attitudes and that the school does attempt to form the values of its students. The Bishops of the United States have listed three major goals that are to be the foundation of the Catholic schools — (1) Message, (2) Community and (3) Service. These goals are the foundation of Catholic school education. An example of how these goals are to be carried out in the school is set forth in Exhibit 1 which is the Diocesan Curriculum Guide for Language Arts.

4. When the Scholarship parent is interviewed by the principal or the principal's assigned representative at the Cleveland Diocesan Schools, the conversation should fully disclose the values included in the school's philosophy.

However, since I am not present at those meetings, I cannot attest to the precise conversation.

5. In order to assess the educational program being conducted at the Cleveland Diocesan Schools that have registered to participate in this Program, one would have to look at much more than the Mission Statements that have been presented to the Court. Based on my experience, I do not believe that a significant number of the schools attempt to carry formal religious classes into other State-mandated secular courses. Attempting to teach religion in a secular education course is quite different from attempting to provide fundamental value formation throughout the entire curriculum. It is my opinion that every school, public or non-public operates from a set of values and attitudes. Some identified, some not. Fundamental values set forth in the attached Language Arts Curriculum Guide are clearly identified and pronounced as the set of values espoused in the Catholic schools.

6. The Second Vatican Council promulgated the Declaration on Christian Education and has clearly pointed out that the educational mission in our Catholic schools cannot mean a lack of respect for the autonomy of the different academic disciplines and the methodology proper to them. In other words, math, reading, English and social studies should be taught in the best manner that current research shows to be effective. Attempting to use religion to shape these courses or the methodology used in these courses would violate this goal.

7. Let there be no mistake. These schools do have a strong fundamental mission to preach the Gospel message

and to work toward the goals of Message, Community and Service in their educational institutions. Additionally, these schools teach the Sate-mandated secular courses in a manner most likely to meet current research concerning effective presentation of that subject matter. If any of the Mission Statements present a contrary impression, then an extensive factual inquiry should be undertaken to determine the education program conducted in each such institution.

FURTHER AFFIANT SAYETH NAUGHT.

s/ Louis Dalton
Louis Dalton

Sworn to before me and subscribed in my presence this 15th day of November 1999.

s/ Jennifer S. Fogarty-Granville
Notary Public
My commission expires:
Apr. 25, 2000
[stamp]

Appendix C

EXHIBIT 1

The learner will:

I. Relate the Christian value DIGNITY OF THE INDIVIDUAL to reading selections

A. Relate instances where respect for individuals is stated or implied in reading selections

B. Explain why one should respect and accept every individual regardless of race, color, ethnicity, religion, sex, work, intellectual ability, or physical appearance

C. Demonstrate respect for, acceptance of and courtesy toward everyone in speech and action

D. Recognize stereotypes of gender bias in reading selection

II. Relate the Christian value RIGHT TO LIFE in reading selections

A. Recognize instances where the individual's Right to Life is directly stated or implied in a reading selection

B. Explain why every person has a right to life

C. Commit oneself through word and action to this belief and to the protection of human life

III. Relate the Christian value SACREDNESS OF THE FAMILY to reading selections

Appendix C

A. Recognize instances which illustrate the sacredness of the family and its importance to society

B. Identify causes of good family relationships

IV. Relate the Christian value NEED FOR LAWS AND REGULATIONS to reading selections

A. Recognize instances that illustrate the purposes and need for laws and regulations

B. Respect and observe the laws and regulations of the school, city, state and country

V. Relate the Christian value JUSTICE AND PEACE to reading selections

A. Demonstrate understanding of the Catholic interpretation of "peace," "justice," "injustice"

B. Recognize in reading selections causes of lack of peace and justice

C. Recognize in reading selections those promoting peace and justice

D. Translate into personal action the example of peacemakers and those working for justice

E. Relate environmental problems to the value of peace and justice

Appendix C

VI. Relate the Christian value RESPECT FOR AMERICAN HERITAGE to reading selections

A. Appreciate persons contributing to our American heritage

B. Recognize instances in reading selections that illustrate the components of the American heritage: justice, equality, responsibility, diversity, privacy, freedom of speech, freedom of religion, right to vote

C. Demonstrate appreciation of one's American heritage by fulfilling one's responsibilities as an American

VII. Relate the Christian value RESPECT FOR PEOPLE OF DIFFERENT CULTURES to reading selections

A. Appreciate the cultures and traditions of different peoples as they are illustrated in stories, poems, drama

B. Demonstrate acceptance of and respect for the cultures, traditions and customs of all peoples

VIII. Relate the Christian value of INTERDEPENDENCE OF ALL HUMAN BEINGS to reading selections

A. Recognize the natural and spiritual interdependence of all human beings

B. Appreciate all that others add to life and living

C. Suggest ways in which individuals can interact harmoniously

Appendix C

IX. Relate the Christian value of GLOBAL INTER-DEPENDENCE to reading selections

A. Recognize instances in reading selections that indicate global interdependence

B. Apply the value of global interdependence to reading and discussion on space science, technology, conversation, business

X. Develop a responsible INQUIRING MIND TO SOCIAL, POLITICAL AND ECONOMIC ISSUES related to Christian values

A. Be aware of the impact on human society of world events recounted in reading and the media

B. Recognize in reading instances of injustice, oppression, and indifference to human suffering

XI. Relate the Christian value DIGNITY OF WORK to reading selections

A. Perceive the dignity of different types of work and occupations as these are illustrated in reading selections

B. Recognize the rights and obligations of both employer and employee

C. Demonstrate in practical ways the conviction that work is dignified

Appendix C

XII. Relate the Christian value CONSERVATION OF NATURAL RESOURCES to reading selections

A. Explain why individual and nations have an obligation to use natural resources wisely

B. Suggest ways individuals, communities and nations can conserve and share natural resources

Appendix C

AFFIDAVIT OF NICOLA L. DAVIES

STATE OF OHIO :
: **ss.**
COUNTY OF CUYAHOGA :

NICOLA L. DAVIES, being first duly sworn, makes the following affidavit concerning her teaching at St. Vitus Catholic School:

1. I serve as a teacher at St. Vitus Catholic School. I am caucasian and a member of the United Methodist Church. I have teaching experience at public and non-public schools.

2. St. Vitus provides a diverse cultural and religious student body. There is no pressure on any of the children to accept or to adhere to doctrines of the Catholic faith. I am not certified to teach religion and I have not been requested to teach religion in my secular courses. Scholarship families choose St. Vitus School because they feel comfortable there; they know their children are safe. The school provides a community where children, parents, teachers and administration are actively involved for everyone's benefit. My discussion with scholarship parents reveals that safety and a better learning atmosphere are key issues in their selection of St. Vitus.

FURTHER AFFIANT SAYETH NAUGHT.

s/ Nicola L. Davies
NICOLA L. DAVIES

Appendix C

Sworn to before me and subscribed in my presence this 11th day of November 1999.

s/ Anthony John Bisceglia
Notary Public
My commission expires:
12/14/2002

Appendix C

IN THE COURT OF APPEALS
FOR THE SIXTH CIRCUIT

COURT OF APPEALS CASE NOS.
99 4041, 99 4038 and 99 4037

DISTRICT COURT CASE NOS.
1:99 CV 1740 and 1:99 CV 1818
(Consolidated)

DISTRICT JUDGE: OLIVER

DORIS SIMMONS-HARRIS, *et al.*,

Plaintiffs/Appellees,

v.

DR. SUSAN TAVE ZELMAN, Superintendent
of Public Instruction, State of Ohio, *et al.*,

Defendants/Appellants.

AFFIDAVIT OF
CHARLES DEBELAK

STATE OF OHIO)
) **ss.**
COUNTY OF CUYAHOGA)

** Mr. Debelek has reviewed and confirmed this Affidavit. He was called out of State and will sign in front of a Notary Public as soon as he returns.

Appendix C

Charles Debelak, being of full age and sound mind and having been first duly sworn, deposes and states that he has personal knowledge of the following facts:

1. I am one of the founders of Birchwood School ("Birchwood"), and have been actively involved with the administration of the School up through the present. Birchwood was founded in 1984, under my direction. The School was established to provide an alternative, high quality, non-religious education to elementary and junior high school students living in the West Park neighborhood of Cleveland. For the first thirteen (13) years of its existence Birchwood rented space on Warren Road in Cleveland. For the academic years 1998-2000, Birchwood has rented space in its current location on Lorain Road in Cleveland, where it intends to stay for the indefinite future.

2. Birchwood has never received financial support from any religious organization. All financial support for Birchwood from the time it came into existence until now has been from tuition and fees, contributions from individuals and businesses, and from the Cleveland Board of Education.

3. Birchwood has never taught a specific religious creed, has never held any religious classes, and has never displayed any religious symbols in the school facilities.

4. Attached hereto as Exhibit "A" is a copy of the teachers' daily schedules for the academic year 1994-1995. The teacher's daily schedules for each academic year Birchwood has been in existence have been substantially similar.

Appendix C

5. Birchwood has consistently maintained a policy and practice that spiritual education of any kind is the parents' responsibility, not the responsibility of the School. The only element of Birchwood's education program which Birchwood promotes which corresponds with a Judaeo/ Christian ethic is the emphasis on the development of strong character and sense of responsibility in the students. These are traits developed through a challenging academic program and complimentary behavioral requirements as described in the current version of the Birchwood Student Handbook.

FURTHER AFFIANT SAYETH NAUGHT.

_____

Charles Debelak

SWORN TO AND SUBSCRIBED BEFORE ME, this __ day of November, 1999.

_____

Notary Public

Appendix C

EXHIBIT "A"

Mrs. Helene Debelak Third through eighth grade reading
Fifth and sixth grade social studies

8:30-8:45	Opening. Biographical readings.
8:45-9:45	Third and fourth grade reading
9:45-10:45	Seventh and eighth grade reading.
10:45-11:05	Recess
11:05-12:05	Fifth and sixth grade reading.
12:45-2:45	Monday and Tuesday 5th and 6th grade Soc. St.
	Wednesday and Thursday administrative work

Mr. Clive Matthews Third through eighth grade composition
Seventh and eighth grade social studies

8:30-8:45	Opening. Biographical readings.
8:45-9:45	Seventh and eighth grade composition
9:45-10:45	Fifth and sixth grade composition
10:45-11:05	Recess
11:05-12:05	Third and fourth grade composition
12:45-2:45	Wednesday and Thursday 7th and 8th social studies

Appendix C

Miss Linda Brown Third through eighth grade mathematics
Fifth through eighth grade science

8:30-8:45	Opening. Biographical readings.
8:45-9:45	Fifth and sixth grade mathematics
9:45-10:45	Third and fourth grade mathematics
10:45-11:05	Recess
11:05-12:05	Seventh and eighth grade mathematics
12:45-2:45	Monday and Tuesday 7th and 8th grade science Wednesday and Thursday 5th and 6th grade science Teacher Assignments and Daily Schedule

Mrs. Theresa Tropp First and second grade reading, language arts and mathematics.

8:30-8:45	Opening. Biographical readings.
8:45-9:45	Reading
9:45-10:45	Mathematics
10:45-11:05	Recess
11:05-12:05	Language Arts

Appendix C

Mrs. Maryse West	First through fourth grade science Third through eighth grade grammar, spelling, vocabulary development.
8:45-9:45	7th-8th Grammar, etc.
9:45-10:45	5th-6th Grammar, etc.
10:45-11:05	Recess
11:05-12:05	3rd-4th Grammar, etc.
12:45-2:45	Monday & Tuesday third and fourth grade science Wednesday & Thursday first and second grade science
Mrs. Judith Little	Third through eighth grade reading First through fourth grade social studies
8:30-8:45	Opening. Biographical readings.
8:45-9:45	Third and fourth grade reading.
9:45-10:45	Seventh and eighth grade reading.
10:45-11:05	Recess
11:05-12:05	Fifth and sixth grade reading.
12:45-2:45	Monday and Tuesday 1st and 2nd grade soc. st. Wednesday and Thursday 3rd and 4th grade soc. st.

Appendix C

Mrs. Andrea Matthews Computer first through eighth grades.

11:50-2:40 M,T,W,Th Groups of 13-14 students in pull-out program.

Mr. Steven Amerkhanian Music first through eighth grade

12:30-3:30 Fridays. One hour sessions with three multi-aged groups of students.

Mrs. Jean Riesen Physical Education first through eighth grade

12:30-3:30 Fridays. One hour sessions with three multi-aged groups of students.

Mrs. Helene Debelak with Art first through eighth grade
Mrs. Kathleen Wood

12:30-3:30 Fridays. One hour sessions with three multi-aged groups of students.

Appendix C

AFFIDAVIT OF DOROTHY DICKSON

STATE OF OHIO :
: **ss.**
COUNTY OF CUYAHOGA :

DOROTHY DICKSON, being first duly sworn, makes the following statement concerning her teaching at Archbishop James P. Lyke Catholic School, St. Henry Campus:

1. I reside at 26402 Buckthorn, Oakwood Village, Ohio 44146. I serve as a teacher at Archbishop Lyke School. My faith tradition is Pentecostal and I am African American. I appreciate the opportunity to teach at this school because of the values it stresses such as respect, responsibility, concern for children. I appreciate the background of this school honoring an African American Bishop by giving the school his name.

2. The scholarship program has enabled scholarship students to achieve at higher academic levels. Students feel a sense of belonging to the school and behavior is likely to remain under control. Parents and teachers join in being proud of the students academic skills.

3. The fact that I am not a member of the Catholic faith does not create a problem. This school reflects a high level of cultural and religious diversity. The overwhelming majority of the children in this school are not of the Catholic faith. There are one hundred sixty-five scholarship pupils in the school.

Appendix C

FURTHER AFFIANT SAYETH NAUGHT.

s/ Dorothy Dickson
DOROTHY DICKSON

Sworn to before me and subscribed in my presence this 11th day of November 1999.

s/ Anthony John Bisceglia
Notary Public
My commission expires:
12/14/2002

Appendix C

AFFIDAVIT OF MR. JON DOUTHIT

STATE OF OHIO :
: **ss.**
COUNTY OF CUYAHOGA :

MR. JON DOUTHIT, being first duly sworn, makes the following statement concerning his children's enrollment as Scholarship pupils in Corpus Christi School:

1. I am a member of the Baptist Church but have selected the Catholic sponsored school for my children because of their specific educational needs and because I concluded that they would best be met at Corpus Christi School. I have seen a genuine growth in my oldest daughter's wanting to learn and be in school. The care and attention that she has received is exactly what we wanted for our youngest. My youngest daughter's teacher has shown that she really cares and has gone beyond the normal realm of teacher student.

2. There was a total lack of discipline at the public school. Here the teachers spend more time with the children. The teachers at this school as distinguished from the public school really care about the children and they don't treat them as just numbers but as real people.

3. I am very pleased with the Scholarship Program because it has enabled my oldest daughter to increase a whole grade level in math and I have seen major improvement in my younger daughter's spelling capabilities.

Appendix C

4. I have not observed any pressure to accept, believe or participate in the Catholic faith. Our children do not have to participate in the sacraments.

s/ Jon Douthit
MR. JON DOUTHIT

Sworn to before me and subscribed in my presence this 11th day of November 1999.

s/ Steve Delchin
Attorney At Law
Notary Public
My commission expires:
My commission has no expiration date. Section 147.03 R. C.
[stamp]

Appendix C

AFFIDAVIT OF ROBERT FINKOVICH

STATE OF OHIO :
: **ss.**
COUNTY OF CUYAHOGA :

ROBERT FINKOVICH, being first duly sworn, states that he is a teacher at Metro Catholic School and makes the following sworn Affidavit concerning the Scholarship Program:

1. I reside at 17308 Sheldon Road, Brookpark, Ohio 44142. I teach the 5th grade students at Metro Catholic School. This is a school that is registered to participate in the Scholarship Program and the students include scholarship pupils. A high percentage of the pupils enrolled in this school are not of the same faith as the sponsoring organization.

2. I am not a member of the Catholic faith. I do not consider myself as belonging to any religious organization and do not have strong religious beliefs. This has not placed me in an uncomfortable situation even though I am teaching in a Catholic school. Approximately half of the teachers in our school are not of the Catholic faith.

3. I have never been asked to teach religion in any of my courses and would not be in a position to do so.

4. The major difference I have observed between Metro Catholic and public schools is the degree of respect the students at our school receive. The respect is not only from the students but from the faculty and administration as well.

Appendix C

FURTHER AFFIANT SAYETH NAUGHT.

s/ Robert Finkovich
ROBERT FINKOVICH

Sworn to before me and subscribed in my presence this 11th day of November 1999.

s/ Steve Delchin
Attorney At Law
Notary Public
My commission expires:
My commission has no expiration date. Section 147.03 R. C.
[stamp]

Appendix C

AFFIDAVIT OF KATHRYN GIBSON

STATE OF OHIO :
: **ss.**
COUNTY OF CUYAHOGA :

KATHRYN GIBSON, being first duly ~~sworn,~~ makes the following sworn statement as a teacher at St. Patrick West Park School:

1. I am a member of United Church of Christ and have been teaching for thirteen years. I have taught for five years at St. Patrick School.

2. The Scholarship Program has enabled ~~many~~ students who could not otherwise afford it to attend a private school of their family's choice. The Program has opened our school to students of diverse religious and ethnic backgrounds and I find that this encourages acceptance of those differences and enables them to live together with greater understanding and respect.

3. The Scholarship pupils oftentimes come to the School quite far behind in academic achievement. The students tend to have more behavior problems and their parents are not as used to parental involvement in the child's educational programs. These factors diminish over time and improve with each year of the Scholarship Program.

4. I am not asked to participate in religious service unless I choose to do so. Other staff members and I share our experiences concerning various religious faith and everyone is very open minded and accepting of differences and diversity.

Appendix C

5. There is no pressure to teach religion in the State-required secular courses.

FURTHER AFFIANT SAYETH NAUGHT.

s/ Kathryn Gibson
KATHRYN GIBSON

Sworn to before me and subscribed in my presence this 11th day of November 1999.

s/ Steve Delchin
Attorney At Law
Notary Public
My commission expires:
My commission has no expiration date. Section 147.03 R. C.
[stamp]

Appendix C

AFFIDAVIT OF TIFFANY GOODGAME

STATE OF OHIO :
: **ss.**
COUNTY OF CUYAHOGA :

TIFFANY GOODGAME, being first duly cautioned and sworn, makes the following Affidavit with respect to the Cleveland Scholarship Program:

1. My name is **TIFFANY GOODGAME**. I live at 13408 Argus Avenue. My daughter is a first grade Scholarship pupil at Holy Redeemer School. I am a single parent with two children. I work and go to school and am trying to make a stable home for my children. The Scholarship Program opened a new door of opportunity for my daughter. Her attitude towards education has changed because of her enrollment at Holy Redeemer.

2. When I heard the Scholarship Program was being revoked by the Court, I thought that I would have to put her back in her old school. She was very upset and didn't want to go to school at all.

3. Even though we are not wealthy, I believe that my daughter deserves the chance to have the best education possible and a chance for a better future.

4. The environment at Holy Redeemer School is very comfortable. Everyone is so friendly, understanding and helpful. I have attended meetings and never met people who were more sincere and concerned about the welfare of these children.

Appendix C

5. The first day my daughter came home from Holy Redeemer, her first comments were that she was so happy that the school had toilet paper in the restroom. This was her first comparison between Holy Redeemer and the public school kindergarten she attended. The students at this school are much more disciplined and the school is more structured. I can tell that my daughter is receiving a higher level of education. My daughter's attitude about education has improved and she is actually excited about going to school every day.

6. We are an African-American family and are not members of the Catholic faith. There is no pressure at the school to follow the traditions of the Catholic church.

FURTHER AFFIANT SAYETH NAUGHT.

s/ Tiffany Goodgame
TIFFANY GOODGAME

Sworn to before me and subscribed in my presence this 11th day of November 1999.

s/ Anthony John Bisceglia
Notary Public
My commission expires:
12/14/2002

Appendix C

AFFIDAVIT OF LYNETTE DENISE GREENE

STATE OF OHIO :
: **ss.**
COUNTY OF CUYAHOGA :

LYNETTE DENISE GREENE, being first duly sworn, makes the following affidavit concerning her teaching at Calvary Center Academy:

1. My faith tradition is Apostolic and I am an African American. I have chosen to teach at Calvary Center Academy because I am able to teach Christian values as well as the state required secular curriculum. At Calvary we assist parents by instilling Christian values that will enable their children to become successful law abiding citizens.

2. The Pilot Scholarship Program has enabled parents and students to make choices that more wealthy families can make and provides the opportunity for lower income students to have a fair chance at success in life.

3. I believe the students who are educated at Calvary will exhibit more leadership abilities in society. The scholarship students who come to us were typically in an overcrowded and unorganized educational atmosphere. They typically complain about how unsafe their prior educational surroundings were. They were unable to get the individual education attention to meet their needs.

Appendix C

FURTHER AFFIANT SAYETH NAUGHT.

s/ Lynette D. Greene
LYNETTE DENISE GREENE

Sworn to before me and subscribed in my presence this 11 day of November 1999.

s/ Anthony John Bisceglia
Notary Public
My commission expires:
12/14/2002

Appendix C

AFFIDAVIT OF SHALENA HACKNEY

STATE OF OHIO :
: **ss.**
COUNTY OF CUYAHOGA :

SHALENA HACKNEY, being first duly sworn, makes the following sworn statement concerning her Scholarship son who is attending St. Patrick School:

1. My son and I live at 17621 Fairville, Cleveland, Ohio 44135. I am African-American and we are of the Baptist faith. I appreciate this school because they do not try to in any way interfere with our Baptist faith. They have not asked about the religion of my son or told us that we have to attend Mass.

2. My son has a wonderful teacher at St. Patrick School and my son has learned more in the last month than for a year at Valley View Elementary School. I appreciate the fact that he can pray in school.

3. St. Patrick School is very helpful to people that are in financial trouble and down and out.

4. This school has my child much further along academically then the public schools would.

5. Even though we are Baptist and the school is Catholic, I like the fact that my child can receive a real good education in a religious atmosphere.

Appendix C

FURTHER AFFIANT SAYETH NAUGHT.

s/ Shalena Hackney
SHALENA HACKNEY

Sworn to before me and subscribed in my presence this 11th day of November 1999.

s/ Steve Delchin
Attorney At Law
Notary Public
My commission expires:
My commission has no expiration date. Section 147.03 R. C.
[stamp]

Appendix C

AFFIDAVIT OF REGENA HUNTER

STATE OF OHIO :
: **ss.**
COUNTY OF CUYAHOGA :

REGENA HUNTER, being first duly sworn, states that she is the mother of Christopher Hunter who is a sixth grade Scholarship student at St. Francis School. She makes the following Affidavit concerning the Scholarship Program:

1. I am a member of the Baptist faith and my children and I are African-Americans. I selected St. Francis School for my child because the moment I set foot in the school, I felt my child and his education was important to the entire staff. There are many differences between this school and my child's previous public schools. At the public schools my child often complained that there was no toilet paper or hand soap in the restrooms. In some of the classrooms, there were buckets to catch water dripping from the ceiling. The classes were overcrowded. He is receiving a much better education in math and reading than he did at the public school.

2. There has been no pressure upon me or my child to alter our religious beliefs. My child has learned how Catholics worship and compares that to ours. It has enriched his own religious beliefs. It has improved his respect for all people of different ethnic and religious background. The teachers at St. Francis School respect my beliefs and have encouraged the parents at the school to continue to take our children to our respective places of worship on a regular basis.

Appendix C

s/ Regena Hunter
REGENA HUNTER

Sworn to before me and subscribed in my presence this 11th day of November 1999.

s/ Anthony John Bisceglia
Notary Public
My commission expires:
12/14/2002

Appendix C

AFFIDAVIT OF ARLINDA JOHNSON

STATE OF OHIO :
: **ss.**
COUNTY OF CUYAHOGA :

ARLINDA JOHNSON, being first duly sworn, makes the following statement about her child's attendance at St. Thomas Aquinas/St. Philip Neri School pursuant to the Scholarship Program:

1. My child is enrolled at St. Thomas Aquinas/St. Philip Neri School as a Scholarship pupil. We are members of the Baptist faith and are an African-American family.

2. I selected this school for my child because I believe that she will get a much better education and because I would rather have her enrolled in a religiously sponsored school. I have brought my daughter up in my faith and I have seen no evidence of any pressure for her to adopt a different religious faith. Her reading skills are getting much better and I believe that the school I have selected for her will make her better prepared for the real world.

s/ Arlinda Johnson
ARLINDA JOHNSON

Sworn to before me and subscribed in my presence this 10th day of November 1999.

s/ Yvonne Williamson
Notary Public
My commission expires: 5/2/01
[stamp]

Appendix C

AFFIDAVIT OF RAYMOND ALEX JONES

STATE OF OHIO :
: **ss.**
COUNTY OF CUYAHOGA :

RAYMOND ALEX JONES, being first duly sworn, makes the following Affidavit concerning the Scholarship Program:

1. I teach at St. Catherine/Archbishop Lyke School and I reside at 2555 North Moreland Boulevard, Shaker Heights, Ohio 44120. My faith tradition is Episcopalian.

2. I have taught in another non-public school. The key difference between public schools and the Catholic/private schools that are part of the Scholarship Program is discipline and genuine concern by students, faculty and parents to the total education of the children. These schools build student character by teaching morality, ethics and good Christian values.

3. I like to teach children how math science and reading are not isolated subjects, but are interconnected. For example, we explored Black History by visiting Africa through reading traditional African folktales that illustrate the seven principles Nguzo Saba (**See Attachment to this Affidavit**). We learned traditional Black/African folksongs. We make masks to go with these traditional Black/African folksongs dances. We study African/Egyptian alphabet and Number systems, Geometry, etc.

Appendix C

4. I am not required to teach religion to the children. The school tries to hire good Christians who will teach, lead the children through example, not by forcing anything down anyone's throat.

FURTHER AFFIANT SAYETH NAUGHT.

s/ Raymond Alex Jones
RAYMOND ALEX JONES

Sworn to before me and subscribed in my presence this 11th day of November 1999.

s/ Anthony John Bisceglia
Notary Public
My commission expires:
12/14/2002

Appendix C

ATTACHMENT -

NGUZO SABA

(The Seven Principles)

Umoja (Unity)
To strive for and maintain unity in the family, community, nation and race.

Kujichagulia (Self-Determination)
To define ourselves, name ourselves, create for ourselves and speak for ourselves.

Ujima (Collective Work and Responsibility)
To build and maintain our community together and make our brother's and sister's problems our problems and to solve them together.

Ujamaa (Cooperative Economics)
To build and maintain our own stores, shops and other businesses and to profit from them together.

Nia (Purpose)
To make our collective vocation the building and developing of our community in order to restore our people to their traditional greatness.

Kuumba (Creativity)
To do always as much as we can, in the way we can, in order to leave our community more beautiful and beneficial than we inherited it.

Imani (Faith)
To believe with all our heart in our people, our parents, our teachers, our leaders and the righteousness and victory of our struggle.

Maulana Karenga

Appendix C

AFFIDAVIT OF CAROLYN JURKOWITZ

State of Ohio :
: ss.
County of Franklin :

CAROLYN JURKOWITZ, being first duly sworn, makes the following Affidavit:

1. I serve as the Associate Director of the Department on Education of the Catholic Conference of Ohio. My duties include the communication of information to all of the chartered non-public schools in the State of Ohio regardless of affiliation or sponsorship. As such, I have had occasion to work with the various non-public schools that have registered to participate in the Pilot Scholarship Program in the Cleveland Public School District.

2. Some of the chartered, non-public schools in the Cleveland Public School District have elected not to register for participation in the Scholarship Program because the Scholarship amount is less than the cost of providing a State-required secular education to the Scholarship pupil. Most participating non-public schools do not receive the full $2,250 per pupil. The Scholarship amount is limited to 90% of the existing tuition. For example, if a given school charges a tuition of $1,500 (the balance of the cost supplemented by charitable solicitations), the Scholarship amount would be $1,350.

3. Public school children in the Cleveland District have the option to enroll without charge in new Community schools that have no religious affiliation and are not governed

by the Cleveland Public School Board. The State provides approximately $4,000 for each child selecting this form of alternate school.

4. As a part of my duties, I have gathered and retained statistics concerning the percentage of pupils in participating religiously affiliated non-public schools that are not of the same religious faith as the sponsor of the school. The percentages, in the ten schools with the highest number of pupils not of the same faith as the sponsoring organization, are as follows:

School Name	Percentage of Enrolled Pupils not of the Same Religious Faith as the Sponsor
Our Lady of Peace	92.79%
St. Thomas/St. Philip	96.30%
St. Joseph Collinwood	93.48%
Archbishop-St. Timothy	92.34%
Archbishop-St. Catherine	90.29%
St. Adalbert	91.82%
Archbishop-St. Henry	89.93%
St. Francis	88.81%
St. Agatha-Aloysius	86.67%
Holy Redeemer	72.00%

Appendix C

5. Needless to say, the percentage of pupils not of the same religious faith as the sponsor varies from school to school. However, the percentage of Scholarship pupils who are not of the same religious faith as the sponsor of the school in which they have enrolled is approximately 62.5%.

6. The Ohio 1999 Proficiency Test results comparing Diocese of Cleveland, State of Ohio public schools and Cleveland Public School District schools is as follows:

RESULTS OF THE MARCH, 1999 OHIO PROFICIENCY TEST (taken by pupils during 8th grade)

	Writing	**Reading**	**Math**	**Citizenship**	**Science**
Diocese of Cleveland	94%*	95%	75%	88%	82%
State of Ohio Public Schools	86%	84%	61%	71%	69%
Cleveland Public School District	57%	57%	22%	40%	28%

* 94% of the eighth graders in the Diocese of Cleveland passed the writing test.

Appendix C

7. An accurate chart reflecting how the Diocese of Cleveland pupils scored in relation to their national public and non-public school counterparts is as follows:

IOWA TEST OF BASIC SKILLS (taken in 1999)			
	Grade 3	**Grade 5**	**Grade 7**
Reading	91 % *	93 %	95 %
Language	89 %	90 %	95 %
Mathematics	89 %	90 %	93 %
Social Studies	91 %	88 %	95 %
Science	88 %	87 %	94 %
Math Computation	89 %	90 %	93 %

* 91% of the students in the third grade in the Diocese of Cleveland scored in the top 25% on the reading test.

8. Approximately 99 % of children attending religiously sponsored schools in the Diocese of Cleveland graduate from high school and approximately 93 % move on to higher education.

9. I have caused a count to be accomplished of the words in the documents supplied by the Hanna Perkins, et al., Intervening Defendants' counsel to Plaintiffs' lawyers. The produced documents contained approximately 1,267,000 words. Plaintiffs' briefs quote 1,165 of those words or less than one tenth of one percent of the total.

Appendix C

10. The Language Arts curriculum guide referred to in the Hanna Perkins, et al., brief is a true and accurate copy of the Diocesan curriculum guide for that subject. The Diocesan Graded Course of Study for Mathematics is accurately set forth in the chart in that brief. I prepared and attest to the accuracy of Exhibit 3 which compares the Diocese of Cleveland Curriculum Guide and the State Model Competency Guide for First Grade Social Studies. I have also compared all of the State model curriculum guides for secular courses to the Diocesan guides for those same courses and find overwhelming similarity between the two. In a great number of instances, the language reflecting the curriculum guides is identical.

11. We have contacted the religiously sponsored non-public schools that have registered to participate in the Ohio Scholarship Pilot Project and have confirmed that none of them discriminates in the admission of pupils on the basis of religion.

FURTHER AFFIANT SAYETH NAUGHT.

s/ Carolyn Jurkowitz
Carolyn Jurkowitz

Sworn to before me and subscribed in my presence this 12th day of November 1999.

s/ Jennifer S. Fogarty-Granville
Notary Public
My commission expires:
Apr. 25, 2000
[stamp]

Appendix C

AFFIDAVIT OF JULIE A. KEEN

STATE OF OHIO :
: **ss.**
COUNTY OF CUYAHOGA :

JULIE A. KEEN, being first duly sworn, makes the following affidavit concerning her teaching at St. John Cantius School:

1. I am of the Presbyterian faith and my racial background is Caucasian. I serve as a full time teacher at Saint John Cantius School and we are registered to accept scholarship students. There are seventeen scholarship students this year. Most of the children come from underprivileged families that would not have the resources to send their children to their school of choice.

2. Approximately one-fourth of our pupils at St. John Cantius are not of the Catholic faith.

3. I have never felt differently while teaching at this Catholic School because of my different religious belief. No one has made any effort to cause me to participate in Catholic traditions. I believe this school accepts and welcomes diversity in all students and faculty.

FURTHER AFFIANT SAYETH NAUGHT.

s/ Julie A. Keen
JULIE A. KEEN

Appendix C

Sworn to before me and subscribed in my presence this 11th day of November 1999.

s/ Steve Delchin
Attorney At Law
Notary Public
My commission expires:
My commission has no expiration date. Section 147.03 R. C.
[stamp]

Appendix C

AFFIDAVIT OF ANN KING-EASH

STATE OF OHIO :
: **ss.**
COUNTY OF CUYAHOGA :

ANN KING-EASH, being first duly sworn, makes this Affidavit as a parent of a Scholarship child attending St. Mel School:

1. I am Caucasian and of the Protestant faith, but have chosen a Catholic-sponsored Scholarship school for my daughter. When I chose St. Mel School for my daughter, I was still attending college myself. We are of course on an extremely tight budget and getting even more in debt. Without the Scholarship Program I could not have provided this quality education for my Scholarship child. I chose St. Mel because I wanted to get a good education for my daughter. I received proper information and also selected it because of its discipline, values and spirituality. St. Mel has a wonderful reputation for quality education. The school was highly recommended by other families.

2. There is a whole different sense of family at St. Mel School compared to the public school and many opportunities to work together and in the community. This helps our child feel more secure and whole. I see more involvement with families at this type of school and a greater sense of closeness with one another. The families know each other here. The children are just not dropped off with a bus and that is it. Most families see each other a lot and look out for each other.

Appendix C

3. Because of this school's commitment to reading, my daughter is enjoying great reading success. Her language and spelling skills are remarkable. Even though she is only in the second grade, she set up a school at home and runs her own library. Her teachers have been wonderful role models and my daughter loves the school. I had previously been concerned about my daughter's math knowledge. However, her confidence and the school's encouragement have placed her on a path of success in that area.

4. The school places no pressure on us to change our faith beliefs. We enjoy the opportunity to attend devotional exercises. There are persons available in the school and Church to speak with parents about differences in beliefs. We enjoy being in this school and still follow our different religious beliefs.

FURTHER AFFIANT SAYETH NAUGHT.

s/ Ann King-Eash
ANN KING-EASH

Sworn to before me and subscribed in my presence this 11th day of November 1999.

s/ Steve Delchin
Attorney At Law
Notary Public
My commission expires:
My commission has no expiration date. Section 147.03 R. C.
[stamp]

Appendix C

AFFIDAVIT OF DANA D. MARTIN

STATE OF OHIO :
: **ss.**
COUNTY OF CUYAHOGA :

DANA D. MARTIN, being first duly sworn, makes the following sworn Affidavit concerning her child who enrolled as a Scholarship pupil at Holy Name Elementary:

1. I am a single mother and work nights. I was advised that I have lost the Scholarship because I recently moved outside the School District. I intend to move back to save the Scholarship. However, since my daughter is doing so well in this alternative school, I will make every financial sacrifice necessary to pay her tuition if I can't regain the Scholarship.

2. I am not a member of the Catholic faith. I am Baptist and we are an African-American family. I chose a Catholic school for my daughter because of the quality of education provided and because of the sound fundamental values that are stressed at these schools. Even though I attended a Catholic school and my daughter does likewise, we are strong in our Baptist (Missionary) faith. Holy Name School has never attempted to change our beliefs in this regard.

3. I appreciate the fact that Holy Name has rules and regulations concerning conduct and discipline that must be followed by all students. The teachers and parents at the school work together in good times and bad for the good of the children. I believe that this education will help my daughter grow into a well-rounded, responsible,

well-educated member of the community. By choosing Holy Name, I believe that I have given her the best start for her future.

4. Sharae does attend religion classes and when she does so, she and I talk about the differences between our faith and the Catholics. She discusses these differences the next day in class and this is an example of the continued diversity that exists at Holy Name. I want my daughter to be able to associate with all walks of life and to grow up knowing that people are different and that the differences make each one of us an individual and special.

s/ Dana D. Martin
DANA D. MARTIN

Sworn to before me and subscribed in my presence this 12th day of November 1999.

s/ Steve Delchin
Attorney At Law
Notary Public
My commission expires:
My commission has no expiration date. Section 147.03 R. C.
[stamp]

Appendix C

AFFIDAVIT OF BARBARA METZLER

STATE OF OHIO :
: **ss.**
COUNTY OF CUYAHOGA :

BARBARA METZLER, being first duly sworn, states that she is a teacher at St. Rocco School in Cleveland and makes the following sworn Affidavit concerning the Scholarship Program:

1. My faith tradition is Protestant. I have taught in both the public and non-public schools.

2. I do not know which of my students are actually Scholarship students. However, I have seen students who have transferred from the public schools to our school and have seen the favorable adjustments that they make after they relax and come to understand our school. Academic achievement increases. The children become more enthused about school. Our expectations concerning homework and academic achievement are higher than at the public schools and another measurable difference is our emphasis on respect, both for other classmates and adults.

3. I have never experienced any pressure because I am not a member of the Catholic faith. The Diocesan graded course of study encourages learning about world religions. I teach about world religions. Respect for other cultures and beliefs is a part of this teaching.

4. Sr. Juddith Walk, the Principal at this school, encourages all students and teachers to practice and

participate in whatever religious tradition we prefer. Neither I nor the students are made to feel uncomfortable because we are of differing religious beliefs.

FURTHER AFFIANT SAYETH NAUGHT.

s/ Barbara Metzler
BARBARA METZLER

Sworn to before me and subscribed in my presence this 11th day of November 1999.

s/ Steve Delchin
Attorney At Law
Notary Public
My commission expires:
My commission has no expiration date. Section 147.03 R. C.
[stamp]

Appendix C

AFFIDAVIT OF MARILYN L. MITCHELL

STATE OF OHIO :
: **ss.**
COUNTY OF CUYAHOGA :

MARILYN L. MITCHELL, being first duly sworn, makes this sworn Affidavit as a teacher at St. Agatha-St. Aloysius School:

1. I am a member of the United Methodist Church and teach the fourth grade at St. Agatha-St. Aloysius School. This school is highly diversified in terms of the religious faiths of the students. It is located in the inner-city and there are approximately 104 Scholarship children enrolled in the school. Students in the Scholarship Program benefit from dedicated teachers and a solid academic program. The Scholarship parents who choose the school believe that their children will benefit from a more structured and safer environment. They appreciate the discipline, the strict dress code and the more effective school-to-home communication. The Scholarship parents are more involved with their children's education. They also appreciate the fact that their children receive instruction in Christian principles such as love of neighbor, justice, forgiveness and compassion.

2. I personally have been accepted as a teacher even though I am not of the Catholic faith and feel that I am appreciated for the gifts that I bring as a Christian who is a member of the United Methodist Church.

s/ Marilyn L. Mitchell
MARILYN L. MITCHELL

Appendix C

Sworn to before me and subscribed in my presence this 12th day of November 1999.

s/ Steve Delchin
Attorney At Law
Notary Public
My commission expires:
My commission has no expiration date. Section 147.03 R. C.
[stamp]

Appendix C

AFFIDAVIT OF ANITA NEDRICH

STATE OF OHIO :
: **ss.**
COUNTY OF CUYAHOGA :

ANITA NEDRICH, being first duly sworn, makes the following sworn statement concerning the Cleveland Scholarship Program:

1. I teach the third grade students at St. Leo the Great School. I am not a member of the Roman Catholic faith. There are 5 Scholarship pupils in my classroom.

2. I believe that our school provides a different choice from the public school because we have a superior learning, behavior and moral environment. We have a dedicated teaching staff, parental involvement in the program, higher achievement testing scores and zero tolerance for unacceptable conduct.

3. I am not required to teach the Catholic faith. However, I believe that I, in effect teach the faith every day by being a Christian role model for the students.

4. I have always felt welcomed and respected by everyone at St. Leo's even though I am of a different faith. The school has always been very welcoming and accommodating to any students regardless of their religious faith.

s/ Anita Nedrich
ANITA NEDRICH

Appendix C

Sworn to before me and subscribed in my presence this 11th day of November 1999.

s/ Steve Delchin
Attorney At Law
Notary Public
My commission expires:
My commission has no expiration date. Section 147.03 R. C.
[stamp]

Appendix C

AFFIDAVIT OF MRS. ELAINE O'DEA

STATE OF OHIO :
: **ss.**
COUNTY OF CUYAHOGA :

MRS. ELAINE O'DEA, being first duly sworn, makes the following affidavit relating to her teaching position at West Park Lutheran School:

1. My faith tradition is Lutheran and I am Caucasian. I teach at this institution because I believe that it provides the best possible instruction for students. The school stresses parent/teacher cooperation. Discipline and guidance are uniformly provided in a manner that fosters growth in the personal and educational lives of the students.

2. The Scholarship Program has allowed families who couldn't afford it to send their children to the school of choice. It has also helped our schools provide more of an ethnic diversity to our student population.

3. The benefits of the Scholarship Program can be illustrated by one of the Scholarship students who came to us from the public schools as a fourth grader. He was unable to function successfully. Upon proper testing and evaluation, we found him to be on a first grade level due to a learning disability that is now being addressed.

4. We find that students who transfer from public school generally are behind academically compared to those who have been at our school since kindergarten. These

transferring students usually haven't developed the responsibility in terms of completing school work. They also seem to need more guidance in self-control. We find that the students transferring from the public school have been apprehensive about their personal safety in school.

s/ Mrs. Elaine O'Dea
MRS. ELAINE O'DEA

Sworn to before me and subscribed in my presence this 11th day of November 1999.

s/ Steve Delchin
Attorney At Law
Notary Public
My commission expires:
My commission has no expiration date. Section 147.03 R. C.
[stamp]

Appendix C

AFFIDAVIT OF ROXIE PENMAN

STATE OF OHIO :
: **ss.**
COUNTY OF CUYAHOGA :

ROXIE PENMAN, being first duly sworn, makes the following statement concerning the Scholarship Program:

1. I reside at 9342 Mt. Auburn, Cleveland, Ohio 44104. I am African-American and not a member of the Catholic faith. My son Nathanael is a Scholarship student at St. Catherine/ Archbishop Lyke School.

2. I appreciate this school because it has more discipline and love for children than the public school. There is no pressure on my child to accept the Catholic faith and there is no pressure concerning religious beliefs. I appreciate the diversity and the fact that everyone is made to feel welcome regardless of religious faith. My son is receiving a very good education.

FURTHER AFFIANT SAYETH NAUGHT.

s/ Roxie Penman
ROXIE PENMAN

Sworn to before me and subscribed in my presence this 11th day of November 1999.

s/ Anthony John Bisceglia
Notary Public
My commission expires:
12/14/2002

Appendix C

AFFIDAVIT OF IRMA L. PETTWAY

STATE OF OHIO :
: **ss.**
COUNTY OF CUYAHOGA :

IRMA L. PETTWAY, being first duly sworn, makes the following affidavit concerning her child's enrollment at St. Vincent De Paul Catholic School as a Scholarship Pupil:

1. My son, Tristan, is in the 5th grade at St. Vincent De Paul Catholic School and he transferred to this school in the 2nd grade. Our racial background is Hispanic and our faith tradition is Pentecostal.

2. My son is receiving a much better in-depth education than he would in the public school system. St. Vincent has provided him an excellent academic structure.

3. There seems to be a lack of control in the public school system. There is poor academic material for the children and the safety level in the public schools is not satisfactory. I feel more comfortable about where my son is now and do not worry about him while he is at school. I have noted much better progress in spelling and physical education.

4. This school does not in any way try to pressure my son to accept its religious beliefs or to, in any way, alter his own. We enrolled in a Catholic School and respect its beliefs. I explained to my son that religion is a choice and that we should respect individual choice to adore God in their separate ways.

Appendix C

5. There are other children at St. Vincent De Paul School who are not of the Catholic faith and the diversity is respected by the school.

FURTHER AFFIANT SAYETH NAUGHT.

s/ Irma L. Pettway
IRMA L. PETTWAY

Sworn to before me and subscribed in my presence this 11th day of November 1999.

s/ Steve Delchin
Attorney At Law
Notary Public
My commission expires:
My commission has no expiration date. Section 147.03 R. C.
[stamp]

Appendix C

AFFIDAVIT OF DIANN RAICA

STATE OF OHIO :
: **ss.**
COUNTY OF CUYAHOGA :

DIANN RAICA, being first duly sworn, makes the following Affidavit:

1. I reside at 5007 Bader Avenue, Cleveland, Ohio 44109. I have three Scholarship children attending St. Mary's Byzantine School. We are not of the same faith tradition as the school and there has been no pressure to cause us to become such. We are caucasian.

2. The educational programs are more personalized than they were at the public schools. My children have to study more and harder than they did before.

3. I am pleased with this Scholarship school because the school pushes my children more and to become better people. This school is more challenging to them and they do not get bored with their education. They are receiving a better education.

FURTHER AFFIANT SAYETH NAUGHT.

s/ Diann Raica
DIANN RAICA

Appendix C

Sworn to before me and subscribed in my presence this 11th day of November 1999.

s/ Steve Delchin
Attorney At Law
Notary Public
My commission expires:
My commission has no expiration date. Section 147.03 R. C.
[stamp]

Appendix C

AFFIDAVIT OF TAMMY RIGGS

STATE OF OHIO :
: **ss.**
COUNTY OF CUYAHOGA :

TAMMY RIGGS, being first duly sworn, makes the following statement about her Scholarship children in St. Stanislaus School:

1. I live at 3590 Beyerle Road, Cleveland, Ohio 44105. We are not members of the Catholic church. We are not pressured in any way because we are not Catholic. The children learn what they can about religion in school and when they come home we discuss differences in religious belief. No one has ever made my children feel uncomfortable because they are not Catholic.

2. We are grateful about the Scholarship Program because my daughters now attend school in a clean, safe Christian environment with teachers who care and take the extra steps to help my children succeed.

3. I am pleased that the Scholarship Program enabled us to transfer from the public school because the children are better behaved here and the teachers are more patient with the children. My daughters are safe in school and prefer a school where children are permitted to pray.

4. My one daughter has improved in almost every subject since she came to St. Stanislaus. In the second grade in public school, she had straight F's so we had her repeat

second grade at St. Stanislaus. She has gradually raised her grades to A's and B's in some subjects and is doing much better.

FURTHER AFFIANT SAYETH NAUGHT.

s/ Tammy Riggs
TAMMY RIGGS

Sworn to before me and subscribed in my presence this 11th day of November 1999.

s/ Anthony John Bisceglia
Notary Public
My commission expires:
12/14/2002

Appendix C

AFFIDAVIT OF RHONDA RUTKOWSKI

STATE OF OHIO :
: **ss.**
COUNTY OF CUYAHOGA :

RHONDA RUTKOWSKI, being first duly sworn, makes the following statement in reference to the Cleveland Scholarship Program:

1. I reside at 5939 Reynolds Road, Mentor Lake, Ohio 44060. I am a teacher at Our Lady of Peace School and I am a member of the Lutheran faith.

2. I have never been asked to teach the tenets of the Catholic faith to my students, but I do try to help the students form fundamental Christian values such as honesty, integrity and respect for others. I have never felt pressured to accept the faith tradition of this school.

3. My own faith is respected. If the Sunday Masses involve school activities, I have never been told to attend those Sunday Masses.

4. The Scholarship students who have enrolled in Our Lady of Peace School are exposed to more educational discipline and higher values are placed upon academic achievement. There is more parent communication.

FURTHER AFFIANT SAYETH NAUGHT.

s/ Rhonda Rutkowski
RHONDA RUTKOWSKI

Appendix C

Sworn to before me and subscribed in my presence this 11th day of November 1999.

s/ Anthony John Bisceglia
Notary Public
My commission expires:
12/14/2002

Appendix C

AFFIDAVIT OF IRENE SANCHEZ

STATE OF OHIO :
: **ss.**
COUNTY OF CUYAHOGA :

IRENE SANCHEZ, being first duly sworn, makes the following sworn Affidavit as a mother of a Scholarship pupil enrolled at St. Rocco School:

1. I am a member of the Protestant faith and my racial background is Hispanic. I have one child enrolled in St. Rocco School pursuant to the Scholarship Program. My son and I have benefited plenty from this Program. My son is getting a good education. I feel happy and safe knowing that he is attending a safe school.

2. I selected St. Rocco School because I knew that my son would receive more attention and a better education. He is doing very well in school. We haven't felt any pressure or discomfort because we are not of the same religious faith as the school. My son isn't pushed into doing anything and religion is not pushed onto anyone. If you are not Catholic, you are excused from Holy Communion and other religious instructions.

FURTHER AFFIANT SAYETH NAUGHT.

s/ Irene Sanchez
IRENE SANCHEZ

Appendix C

Sworn to before me and subscribed in my presence this 11th day of November 1999.

s/ Steve Delchin
Attorney At Law
Notary Public
My commission expires:
My commission has no expiration date. Section 147.03 R. C.
[stamp]

Appendix C

AFFIDAVIT OF MARCUS SIMS

STATE OF OHIO :
: *ss.*
COUNTY OF CUYAHOGA :

MARCUS SIMS, being first duly sworn, makes the following affidavit concerning his children enrolled in West Park Lutheran School as Scholarship Students:

1. I have two children enrolled in West Park Lutheran School pursuant to the Scholarship Program. My faith tradition is Christian and we are an African American family.

2. The Scholarship Program gives low income families an opportunity to make education choices for their children that wouldn't otherwise be available. It gives me the opportunity to pick the right school for my kids. It gives them a chance to get a decent education, without distractions. I feel better about the smaller classroom size at this school. West Park Lutheran has a reputation of being one of the best private schools in the Greater Cleveland area. I would certainly recommend it to any disadvantaged household that wants to get a better education for their children. I certainly believe that West Park Lutheran has better educational programs in English and Spelling than the public schools.

3. Neither I nor my children have felt any pressure or suggestions to convert to become Lutherans. My kids have never come home confused about anybody's beliefs

or practices and they are getting a fine education that will help them to become better citizens.

FURTHER AFFIANT SAYETH NAUGHT.

s/ Marcus Sims
MARCUS SIMS

Sworn to before me and subscribed in my presence this 11th day of November 1999.

s/ Steve Delchin
Attorney At Law
Notary Public
My commission expires:
My commission has no expiration date. Section 147.03 R. C.
[stamp]

Appendix C

AFFIDAVIT OF MRS. GINA SOMERVILLE

STATE OF OHIO :
: **ss.**
COUNTY OF CUYAHOGA :

MRS. GINA SOMERVILLE, being first duly sworn, makes the following statement concerning her children's enrollment as Scholarship pupils in Blessed Sacrament School:

1. I reside at 3831 Sackett Avenue, Cleveland, Ohio. My zip code is 44109. I am a member of the Lutheran Church. I am extremely pleased that I have chosen Blessed Sacrament for my children because they are thriving in this environment and, but for the Scholarship Program, we would not be able to exercise this choice.

2. My oldest son was in public school prior to attending Blessed Sacrament. We saw a major difference with much higher motivation towards education while he was attending Blessed Sacrament.

3. Both of my children are now excelling in all of their education subjects. They have developed a bond with their teacher and their environment.

4. Blessed Sacrament has not pressured me or my children to change our religious beliefs. They do learn about the Catholic faith in Blessed Sacrament School but this has not altered their beliefs and I believe that this helps them have a well-rounded education.

Appendix C

s/ Mrs. Gina Somerville
MRS. GINA SOMERVILLE

Sworn to before me and subscribed in my presence this 11th day of November 1999.

s/ Steve Delchin
Attorney At Law
Notary Public
My commission expires:
My commission has no expiration date. Section 147.03 R. C.
[stamp]

Appendix C

AFFIDAVIT OF JOYCE STALEY

STATE OF OHIO :
: **ss.**
COUNTY OF CUYAHOGA :

JOYCE STALEY, being first duly sworn, makes the following statement about the Scholarship Program:

1. I am a member of the Lutheran faith and reside at 5350 Knollwood Drive, # 4, Parma, Ohio.

2. I teach the third grade students at St. Stanislaus Elementary School, but do not teach religion. I also previously taught in a public school.

3. I note that the students in this school are encouraged and supported in their beliefs regardless of their religious preference.

4. The school accepts the teachers and students as they are and are not encouraged to change their beliefs in any way.

5. I previously taught in a more rural atmosphere that provided high quality education. I believe that these Scholarship students in the private schools in Cleveland are getting this same type of quality education that was provided in that school.

s/ Mrs. Joyce Staley
JOYCE STALEY

Appendix C

Sworn to before me and subscribed in my presence this 11th day of November 1999.

s/ Anthony John Bisceglia
Notary Public
My commission expires:
12/14/2002

Appendix C

AFFIDAVIT OF MRS. SHERLANDER THOMAS

STATE OF OHIO :
: **ss.**
COUNTY OF CUYAHOGA :

MRS. SHERLANDER THOMAS, being first duly sworn, makes the following statement concerning her children's enrollment as Scholarship pupils in Blessed Sacrament School:

1. I reside at 3137 W. 50th, Cleveland, Ohio. My zip code is 44102. I am not of the Catholic faith. My faith tradition is Christian and I am African American. I selected Blessed Sacrament as the scholarship school of choice because the school environment is disciplined and very well organized. There is no negativity around. I can send my children to school and not have to worry about any bad influences. I don't have to worry about them getting into fights or experiencing assaults upon teachers. I selected this school because it is safe and I know my children will get a very good education.

2. I decided to put my children into this school on a trial basis to see if the curriculum was satisfactory. I am completely satisfied. The teachers and parents are heavily involved in the children's education and it is quite clear that the teachers do care about the quality of education the children receive.

3. My daughter attended public school for awhile and I was upset because no one would be present at parent

meetings. The children didn't seem to learn anywhere near as much as they do at Blessed Sacrament School. I am particularly pleased with Blessed Sacrament because my children are showing a stronger interest in reading; they enjoy spelling and phonics and are doing much better in math.

s/ Sherlander Thomas
MRS. SHERLANDER THOMAS

Sworn to before me and subscribed in my presence this 11th day of November 1999.

s/ Steve Delchin
Attorney At Law
Notary Public
My commission expires:
My commission has no expiration date. Section 147.03 R. C.
[stamp]

Appendix C

AFFIDAVIT OF YVETTE D. THOMAS

STATE OF OHIO :
: **ss.**
COUNTY OF CUYAHOGA :

YVETTE D. THOMAS, being first duly sworn, makes this statement as a parent of Scholarship children attending St. Agatha-St. Aloysius School:

1. We are an African-American family and members of the Baptist Church. I have two Scholarship students attending St. Agatha-St. Aloysius School.

2. I have three children attending this school and would not have been able to do this without the Scholarship Program because I would not have the financial capability to handle the cost. It is important to me that all three of my children attend the same school.

3. I chose this school after meeting with the Principals. Sr. Sandra won my heart with her pleasantness, sincerity, understanding, dedication and commitment.

4. This Scholarship school is preferable to public school because the school has more discipline, greater diversity, better safety and is family oriented. The children and parents have constant contact with teachers and the children are rewarded for jobs well done. The families are encouraged to work together for good causes. The school is a "community" and parents are helped in such things as parenting workshops.

Appendix C

5. I am aware that my children are receiving a better education here than they would in the public schools.

6. Although St. Agatha-St. Aloysius School is not of our faith, the student body is highly diversified in terms of religious beliefs. The children are made aware that there are more religious versions than one. Although there is religious diversity, the school teaches things that all religions should teach, such as family unity and that "family unity" makes a community strong. We do have a strong school community consisting of students, teachers, parents and the sponsoring Parish. My children were baptized as Baptists recently. They announced this at the school and everyone was happy and overjoyed for them. There has never been any effort to change my children's views about their Baptist religion.

s/ Yvette D. Thomas
YVETTE D. THOMAS

Sworn to before me and subscribed in my presence this 11th day of November 1999.

s/ Anthony John Bisceglia
Notary Public
My commission expires:
12/14/2002

Appendix C

AFFIDAVIT OF PAMELA WARD

STATE OF OHIO :
: **ss.**
COUNTY OF CUYAHOGA :

PAMELA WARD, being first duly sworn, makes the following statement concerning her daughter's enrollment as scholarship pupil at the St. Henry Campus of Archbishop Lyke Catholic School:

1. I am the African American mother of a daughter who is enrolled as a third grade student at the St. Henry campus as a scholarship pupil. We are members of the Baptist Church.

2. The scholarship program has enabled me to choose the best education for my daughter. She is an "A" student and I attribute it to the quality of education provided at the school she is attending now.

3. I selected this school because I had received recommendations as to the high academic quality. My child has improved in all of her academic subjects since she has been at Archbishop Lyke. Her greatest improvement has been in reading and math.

4. Attendance at Archbishop Lyke has not in any way impaired our membership in the Baptist Church. This school respects the religious freedom of parents and students.

Appendix C

FURTHER AFFIANT SAYETH NAUGHT.

s/ Pamela Ward
PAMELA WARD

Sworn to before me and subscribed in my presence this 11th day of November 1999.

s/ Anthony John Bisceglia
Notary Public
My commission expires:
12/14/2002

Appendix C

AFFIDAVIT OF MARIJA YOVICH

STATE OF OHIO :
: **ss.**
COUNTY OF CUYAHOGA :

MARIJA YOVICH, being first duly sworn, makes the following Affidavit:

1. I reside at 8480 Windsor Way, Broadview Heights, Ohio 44147. I teach the third grade, self-contained class at St. Mary Byzantine Catholic School. I teach all subjects except religion. I am not of the same faith tradition as St. Mary Byzantine, although many of my beliefs coincide with the Byzantine faith.

2. I have taught in the public and non-public schools.

3. St. Mary Byzantine compares favorably to the public schools because it has a more positive learning environment for the students and a more caring and dedicated staff. The staff is concerned with the educational progress of each child and concerned with the positive emotional, social and physical development of each child.

4. The children in this school, as compared to the public school, have more confidence in themselves. If they have an academic or social problem, they feel free to talk to the teachers. The teachers listen to them and try to help them. The children receive more individual attention and the parents and teachers cooperate towards the well-being of the children.

Appendix C

5. From what I have observed, all of the different religious denominations are respected equally at this school.

FURTHER AFFIANT SAYETH NAUGHT.

s/ Marija Yovich
MARIJA YOVICH

Sworn to before me and subscribed in my presence this 11th day of November 1999.

s/ Steve Delchin
Attorney At Law
Notary Public
My commission expires:
My commission has no expiration date. Section 147.03 R. C.
[stamp]